Supreme Court, U.S.
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No. 01-

IN THE

Supreme Court of the United States

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD & SEABOARD MARINE LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Petition concerns unresolved questions of federal law and a conflict among various Circuits regarding union and employee access to judicial review of a National Labor Relations Board (the "Board") representation decision. Congress enacted the National Labor Relations Act (the "Act") to protect workers from inherent inequality in bargaining strength and to ensure that employees enjoy the right to organize and benefit from collective bargaining. 29 U.S.C. § 151. Congress created the Board to promote union strength and ensure that employees enjoy full freedom of association, self-organization, and designation of representatives guaranteed under the Act. 29 U.S.C. §§ 153, 157. Courts have historically afforded incredible deference to the Board to advance the Act's considerations. Like any administrative agency, however, the Board should be subject to checks and balances. If the Board violates due process or disregards its statutory obligations, parties governed thereunder must have the ability to obtain judicial relief. This is the underlying premise of the following questions presented for certiorari review:

1. Whether a district court has subject matter jurisdiction to provide declaratory relief when the Board violates due process rights by disregarding its own rules and regulations;

2. Whether the Board's violation of its internal rules or guidelines should be treated as a violation of an express statutory mandate, thereby vesting a district court with jurisdiction to render relief under the doctrine articulated in *Leedom v. Kyne*, 358 U.S. 184 (1958).

3. Whether a district court has jurisdiction to render declaratory relief pertaining to a Board representation decision when the Court's exercise of jurisdiction will not interfere with a Board-ordered election and the limitation on review of a representation proceeding was intended to prevent employers, rather than unions, from seeking judicial relief that could delay the election machinery.

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The International Longshoreman's Association, Local 1922 ("ILA") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit which, after granting oral argument, *per curiam* affirmed a decision by the United States District Court, Southern District of Florida, dismissing ILA's case.

OPINIONS BELOW

The district court's opinion (per King, D.J.) dismissing ILA's Amended Complaint is published at 2001 WL 915375, 144 Lab Cas. P. 11, 120. The court of appeals' *per curiam* affirmance is not published.

STATEMENT OF JURISDICTION

The court of appeals issued its decision on January 17, 2002, making the petition for writ of certiorari due in this Court by April 17, 2002. ILA invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the National Labor Relations Act, 29 U.S.C. §§ 151, 157, 159, and 160, and 29 C.F.R. §§ 102.51 and 102.67, relevant to this petition are reprinted in Appendix G.

STATEMENT OF THE CASE

ILA is a labor union that sought to represent a group of Seaboard Marine, Ltd.'s employees sharing a community of interests in wages, scope of employment, and job characterization. ILA petitioned the Board to designate the

employees as a unit and to schedule an election, allowing the unit to vote for their desired union representative. Following an evidentiary hearing before a hearing officer, where the employees testified about their job duties and their desire to be grouped together, the Acting Regional Director concluded that the employees shared a community of interests, designated them as a unit, and scheduled an election (App. C at 30a). The unit voted for their desired representative, but the employer sought further review of the Acting Regional Director's Decision and Direction of Election and the Board impounded the ballots. The employer argued that only a wall-to-wall unit, comprised of all of its employees, would constitute an appropriate bargaining unit.

Board Statements of Procedure Sections 101.21 and 102.67 indicate that the Acting Regional Director's decision will be final, and expressly limit the Board's authority to review such a decision. As explained in Section 101.21(a):

> Pursuant to Section 3 [29 U.S.C. § 153] of the Act, the Board has delegated to its Regional Directors its powers under Section 9 [29 U.S.C. § 159] of the Act to **determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings and determine whether a question of representation exists and to direct an election or take a secret ballot under Subsection C** or E of Section 9 and certify the results thereof. . . . The Regional Director may at any time transfer the case to the Board for decision, **but until such action is taken, it will be presumed that the Regional Director will decide the case. In the event the Regional Director decides the issues**

> **in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.**

(emphasis added). As set forth in Section 102.67:

> **Accordingly a request for review [of a Regional Director's decision] may be granted only upon one or more of the following grounds**: (1) That a substantial question of law or policy is raised because of (i) the absence of or (ii) a departure from officially reported board precedent. (2) That the regional directors' decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. (4) That there are compelling reasons for reconsideration of an important board rule or policy.

(emphasis added). The Board disregarded the foregoing limitations, however, and instead held that there existed "substantial issues warranting review" and accepted review of the Acting Regional Director's Decision and Direction of Election (App. D at 35a). Over one year after the unit employees voted, the Board disagreed with the Acting Regional Director. In its Decision on Review, the Board concluded that the Acting Regional Director's Decision and Direction of Election was arbitrary, and rejected her conclusion (App. E at 37a). The Board showed no deference to the Acting Regional Director's "final" Decision and Direction of Election. Upon rehearing, a different regional director concluded that only a "wall-to-wall" unit comprised

of all employees was appropriate (App. F at 78a). When ILA sought further review, the Board refused to consider the matter further, leaving the employees who originally sought to be represented by ILA subsumed within an oversized unit and without representation.

The Act does not provide any method for a union to obtain appellate review of a Board representation decision. With no available appellate review or other administrative remedy, ILA sued in the United States District Court, Southern District of Florida, seeking declaratory relief for the Board's violation of the Act, which requires the Board to ensure employees full freedom of representation of their own choice. ILA also sought a declaration that the Board violated its own rules by accepting review of an Acting Regional Director's Decision and Direction of Election for a generic, catch-all reason not expressly authorized under Section 102.67, and that this violation deprived ILA and employees of due process and infringed First Amendment rights of association and property interests in representation of the unit. Subject matter jurisdiction existed because ILA sued for violation of the Act, a federal statute, and for violation of Constitutional rights.

The district court dismissed ILA's Complaint, however, concluding that representation decisions under 29 U.S.C. § 159(c) are solely within the purview of the Board (App. B at 7a, 10a). The district court held that the Board is not required to articulate a basis for accepting review of one of its regional director's representation decisions, notwithstanding ILA's allegations that the Board accepted review for a reason other than one of the four narrow bases enunciated in Section 102.67 (App. B at 10a). The district court also held that the Board satisfied any such obligation

by claiming that it accepted review of the Acting Regional Director's Decision because of the existence of "substantial issues warranting review." The Eleventh Circuit Court of Appeals *per curiam* affirmed the district court's dismissal.

The district court's decision and subsequent affirmance merit review in this Court because the decision centers upon critical, unresolved questions of federal law that significantly impact union and employee rights. Congress vested the Board with vast authority to oversee representation matters, but left unions and employees without any remedy if the Board undermines the purpose of the Act or if the Board disregards its rules and regulations in connection with representation proceedings. This closes the door to judicial review to groups who have no alternative recourse.

REASONS FOR GRANTING THE WRIT

I. A DISTRICT COURT SHOULD HAVE SUBJECT MATTER JURISDICTION TO RENDER DECLARATORY RELIEF TO AN AGGRIEVED PARTY WHEN THE BOARD DISREGARDS ITS OWN RULES, THEREBY VIOLATING A PARTY'S DUE PROCESS RIGHTS.

A. An injured union and employees seeking its representation should have a forum for relief when Board action violates its due process rights.

When a union or employees petition the Board to designate a unit of employees that share a community of interests and desire to be grouped together for purposes of voting for a representative union, the Board must be guided by the strict guidelines enunciated in the Act and by its

internal Statements of Procedure. If the Board disregards either the Act or its own rules, an injured party should have a forum for relief.

The Act does not, on its face, foreclose judicial review of a representation decision designating a group of employees as a unit and scheduling an election. Because the designation of a unit is not a final proceeding, however, courts have historically construed the Act as prohibiting immediate appellate review. *Boire v. The Greyhound Corporation*, 376 U.S. 473 (1964). Conceptually, following a representation decision, neither an employer nor a union is entitled to direct appellate review. As this Court explained in *Boire*:

> This court held as long ago as *American Federation of Labor v. National Labor Relations Board*, 308 U.S. 401, that the final orders made reviewable by §§ 10(e) and (f) in the Courts of Appeals do not include Board decisions in certification proceedings. Such decisions, rather, are normally reviewable only where the dispute concerning the correctness of the certification eventuates in a finding by the Board that an unfair labor practice has been committed as, for example, where an employer refuses to bargain with a certified representative on the ground that the election was held in an inappropriate bargaining unit. In such a case, 29 U.S.C. § 159(d) of the Act makes full provision for judicial review of the underlying certification order by providing that such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed in the Court of Appeals.

Boire, 376 U.S. at 476-7. This Court further noted that the principle of non-reviewability had been legislatively created to protect unions and employees from attrition that would likely result if an employer had the ability to impede the election process through a lengthy appeal following a union election victory. *Id.* at 478, citing H.R. Rep. No. 972, 74th Congress, First Session, 5.

As one court analyzing the principle of non-reviewability explained, "This statutory scheme was designed by Congress to prevent the delays in the election and certification process that were thought to be inevitable if frequent recourse to pre-election review were permitted." *N.L.R.B. v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 105 (3d Cir. 1979). *See Catalytic Industries Maintenance Company v. Compton*, 333 F. Supp. 533, 536 (D. Puerto Rico 1971) ("This policy of non-reviewability is based upon the explicit congressional mandate that representation proceedings be expeditiously resolved and that **employee collective rights attendant thereto** be effectuated free of time consuming delays which would necessarily flow from direct judicial review.") (emphasis added). *See also Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158, 1163 (5th Cir. 1969) (holding that the reason for circumscribing court interference in representation matters is to avoid dilatory tactics when the "employer really had no substantial objections to the conduct of the election other than a desire to delay bargaining as long as possible").

Although Congress may have intended to limit both an employer's and a union's ability to appeal a representation proceeding, an aggrieved employer retains the enviable power to obtain such review by refusing to bargain with a prevailing union, thereby compelling the Board to initiate an unfair labor practice charge under 29 U.S.C. § 160. That section

authorizes a circuit court to review, by direct appeal, an unfair labor practice charge as well as the underlying representation decision that precipitated the unfair labor charge. *Interstate Dress Carriers, Inc.*, 610 F.2d at 107. Although employers have the power to appeal the representation decision, conversely, the aggrieved union has no such right. *Id.* at 109. This one-way street is particularly dangerous because bargaining unit determinations are the key to a union's organizational efforts. Employers have historically diffused union influence by seeking larger bargaining units because the larger and more diverse the unit, the more difficult it is for a union to organize and represent those employees. The ultimate unit determination in this case, contrary to the original unit designated by the Acting Regional Director, has such breadth and diversity that it precludes ILA's entrance into the employer's workplace — regardless of employee choice.[1] This frustrates the very purpose of the Act. Also, by refusing to bargain with a union to compel an unfair labor practice charge, the employer retains the power to impede employees' representation choice and to obtain a lengthy review — the very delay Congress sought to avoid.

Because a losing union cannot initiate an unfair labor practice charge, hopes of appellate review are squelched. Additionally, if district courts refuse to accept jurisdiction out of deference to the Board's authority, unions and employees have no means of relief. When, as in this case, the Board deems that a representative unit comprised of all

1. The ultimate unit designated by the Board here is comprised of employees ranging in diversity from a laborer to a licensed insurance claims representative. ILA exists to represent the longshoreman. The Board's ultimate designation of a unit comprised of all employees prevents ILA from organizing those workers who sought its representation.

employees is the **only** appropriate bargaining unit, the aggrieved union loses the ability to organize the employees in the future. The employees who sought ILA's representation are left with none. Instead, they are subsumed within an oversized unit that, even if eventually unionized, will not have the capacity to address their particular needs. Therefore, the Board effectively deprives those employees of freedom of representation.

This Court rejected the notion that a losing union should be deprived of access to judicial review in *Leedom v. Kyne*, 358 U.S. 184 (1958), which articulated a well-settled, albeit narrow, exception to non-reviewability. In *Leedom*, this Court held that a district court obtains jurisdiction to entertain a direct action by a union when the Board violates a specific statutory mandate. *Id.* at 188. This Court explained that a district court is not actually reviewing the Board's representation decision, but is striking down action in derogation of the Board's authority. Significantly, this Court noted the union's inability to obtain alternative relief as a critical factor in creating the exception. *Id.* at 190.

Before *Leedom*, the Second Circuit Court of Appeals announced another exception to non-reviewability in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), where it concluded that a district court had jurisdiction to enjoin the Board from taking action which would infringe a constitutional right. In *Fay*, the plaintiff had alleged that the union had a property interest in maintaining its position as a bargaining agent and that the Board invaded this interest. The Second Circuit held that when a plaintiff alleges deprivation of a constitutional right that is not transparently frivolous, the district court should exercise jurisdiction over the representation matter and any other questions regardless of whether they are independently justiciable. *Fay*, 172 F.2d at 724.

Courts applying or distinguishing *Fay* have noted the unavailability of any alternative remedy as a relevant factor in deciding that the district court has jurisdiction. As one district court opined in distinguishing *Fay*:

> Those cases [*Fay* and its progeny] involved situations where District Court intervention in Board proceedings was necessary to prevent irreparable injury to a party's constitutional rights because no other adequate avenue for review existed. Thus, *Fay v. Douds*, *supra*, concerned a final determination by the Board that an incumbent Union could not participate in a representation election; the Union would have been entirely without recourse had the District Court not assumed jurisdiction over the constitutional claim raised by the Union.

Semi-Alloys, Inc. v. Morio, 490 F. Supp. 422, 425 (S.D. N.Y. 1980). Although various circuit and district courts have considered whether a union's assertion of the Board's violation of a constitutional right vests a district court with jurisdiction to hear the case, this Court has never addressed this critical jurisprudential question, leaving both an unresolved question of federal law and a conflict among various circuits.[2]

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2. *See Local 25, Intern. Broth. of Teamsters, Chauffeurs, Warehousemen, et al. v. Greene*, 196 F. Supp. 772, 773 (D.C. Mass. 1961) (characterizing *Fay* as a well-recognized exception to non-reviewability); *McCormick v. Hirsch*, 460 F. Supp. 1337, 1347 (M.D. Pa. 1978) (applying *Fay* and concluding that jurisdiction is appropriate when the plaintiff made a showing that his constitutional rights would be infringed regardless of section 10 of the Act); *Boyles*

(Cont'd)

(Cont'd)
Galvanizing Co. v. Waers, 291 F.2d 791, 792 (10th Cir. 1961) (noting jurisdiction if Board violates due process); *McCulloch v. Libbey-Owens-Ford Glass Co.*, 403 F.2d 916, 917 (D.C. App. 1969), *cert. den.*, 393 U.S. 1016 (observing that court can enjoin Board action that violates the constitution); *Florida Bd. of Bus. Reg., Div. of Pari-Mutual Wagering v. N.L.R.B.*, 686 F.2d 1362, 1373, n.12 (11th Cir. 1982) (identifying *Fay* as one of three extraordinary circumstances justifying district court jurisdiction in a dispute arising out of a Board representation proceeding); *Catalytic Ind. Maintenance Co. v. Compton*, 333 F. Supp. 533, 537 (D. Puerto Rico 1971) (recognizing *Fay* exception to non-reviewability but refusing to apply it); *University of Vt. v. Vt.*, 748 F. Supp. 235, 244 (D. Vt. 1990) (applying *Fay* and concluding that district court had jurisdiction to review claims of constitutional deprivations by the Board that are not transparently frivolous); *United Fed. Of College Teachers v. Miller*, 479 F.2d 1074 (2d Cir. 1973) (recognizing the *Fay* exception); *U.S. Pillow Corp. v. McLeod*, 208 F. Supp. 337, 340 (S.D.N.Y. 1962) (recognizing *Fay* but finding no deprivation of due process); *Groendyke Transp., Inc. v. Davis*, 406 F.2d 1158 (5th Cir. 1969), *cert. den.*, 394 U.S. 1012 (recognizing the *Fay* exception); *Int'l Assoc. of Tool Craftsmen v. Miller*, 389 F. Supp. 1078, 1083, n.1 (E.D. Tenn. 1974) (recognizing the *Fay* exception); *Amalgamated Meat Cutters, etc. v. Allen*, 298 F. Supp. 985, 990 (W.D. Mo. 1969) (assuming that *Fay* applies but refusing to find a Constitutional violation); *Teamsters, Chauffeurs, etc. v. N.L.R.B.*, 375 F.2d 966, 970 (9th Cir. 1967) (recognizing the *Fay* exception); *Bakery, Confectionery and Tobacco Workers' Intern. Union, Local 6 v. N.L.R.B.*, 799 F. Supp. 507, 510 (E.D. Pa. 1992) (questioning the continuing validity of the *Fay* exception and noting that the Supreme Court has not adopted it); *See Interstate Dress Carriers*, 610 F.2d 99 at 106 (noting that *Fay* has not been adopted by the Supreme Court); *See Greensboro v. Hosiery Mills, Inc. v. Johnston*, 377 F.2d 28, 32 (4th Cir. 1967) (reversing the district court and concluding that *Fay* does not apply in the Fourth Circuit); *Southern Ohio Coal Co. v. Surface Min., Reclamation and Enforcement, Dep't of Interior*, 20 F.3d 1418, 1425 (6th Cir. 1994) (relying on *Fay*); *Squillacote v. Int'l Brotherhood of*
(Cont'd)

This Court should address the issue and resolve whether the Board's violation of a union's due process or other Constitutional rights vests jurisdiction in a district court to afford relief. ILA alleged that the Board's disregard for its own rules violated ILA's due process and First Amendment rights of association with those employees who sought its representation. *See Professional Assoc. of College Educators v. El Paso Cty. Community College Dist., et al.*, 730 F.2d 258, 262 (5th Cir. 1984) (holding that the First Amendment right of association extends to unions as well as those employees seeking its representation).

(Cont'd)

Teamsters, Local 344, 561 F.2d 31, 37-8 (7th Cir. 1977) (analyzing *Fay* and rejecting its application); *Blue Cross and Blue Shield of Michigan v. N.L.R.B.*, 609 F.2d 240, 244 (6th Cir. 1979) (treating the *Fay* exception to non-reviewability of the Board's representation decision as dictum and refusing to apply it); *National Maritime Union of America, AFL-CIO v. N.L.R.B.*, 375 F. Supp. 421, 434-35 (E.D. Pa. 1974) (noting that *Fay* preceded *Leedom v. Kyne* and that the doctrine established therein has never been recognized by the Supreme Court and that the Second Circuit has limited it to denials of procedural due process); *Grutka v. Barbour*, 549 F.2d 5, 10, n.7 (7th Cir. 1977) (questioning viability of *Fay* but deeming it inapplicable under the facts of the case); *Midway Clover Farm Market, Inc. v. N.L.R.B.*, 318 F. Supp. 375, 378-79, n.2 (D. D.C. 1969) (finding no violation under *Fay* and noting that it has never been recognized by the Supreme Court); *Sav-On Drugs, Inc. v. Cuneo*, 46 Lab. Cas. P. 17903 (D. N.J. 1962) (acknowledging *Fay*, but refusing to apply it); *United States Metal Co. Employees' Assoc. v. United States, N.L.R.B.*, 478 F. Supp. 861, 863-64 (W.D. Pa. 1979) (rejecting application of *Fay* exception and noting that the Third Circuit has not accepted the doctrine); *Hughes v. Getreu*, 266 F. Supp. 15, 17 (S.D. Ohio 1967) (noting that only the Second Circuit adhered to the *Fay* exception); *Cihacek v. N.L.R.B.*, 464 F. Supp. 940, 944 (D. Ne. 1979) (recognizing *Fay* but noting that it has never been adopted by the Supreme Court and has been criticized by certain circuits).

In *McCormick*, a district court analyzed whether it had subject matter jurisdiction to enter an injunction relating to a representation proceeding when the plaintiff alleged a First Amendment violation pertaining to religious freedom. The court concluded that the Board could not proceed in any manner that would infringe basic constitutional rights. *McCormick*, 460 F. Supp. at 1342. In applying *Fay*, the Court observed, "[I]f the action of the NLRB is unconstitutional, it would be *per se* beyond the Board's jurisdiction and in conflict with the legislative intent of the Act." *Id.* at 1343. As the Court continued, "Certainly, if the protection of any right is sufficiently extraordinary to require immediate review, it is an allegation that First Amendment rights are on the verge of being abused." *Id.*

B. Whether the Board's disregard for its own rules and operating procedures constitutes a violation of due process rights, thereby supporting district court jurisdiction under *Fay v. Douds*, remains an open question.

ILA sought a declaration that the Board violated Board Statements of Procedure Sections 102.21 and 102.67 by accepting review of an otherwise final Decision and Direction of Election rendered by its Acting Regional Director for a stated basis that fell outside the four categories set forth in Section 102.67. This Court should address whether the Board's disregard for its internal operating procedures constitutes a violation of due process that supports district court jurisdiction under *Fay*.

Circuit courts have recognized that Section 102.67 is a strict limitation upon the Board's authority to review a regional director's decision. *See N.L.R.B. v. Sav-On Drugs,*

Inc., 704 F.2d 1147, 1149 (9th Cir. 1983) (recognizing that regional director's decisions are not merely intended to be advisory or recommendations, but are intended to be final unless reviewed for the limited bases set forth in the rule and further noting that "the grounds for review listed in the regulations are quite limited"); *See also N.L.R.B. v. Difco Laboratories, Inc.*, 389 F.2d 663, 667 (6th Cir. 1968) (observing that a regional director's decision may be reviewed by the Board but that Board regulations "severely limit the scope of review"). This is consistent with the well-settled principle that an administrative agency is bound by its own rules and regulations and that an agency's failure to abide by its rules is a due process violation. *Accardi v. Shaughnessy*, 347 U.S. 260, 267 (1954) ("An agency's failure to follow its own regulations . . . may result in a violation of an individual's constitutional right to due process."); *Sameena, Inc. v. United States Air Force*, 147 F.3d 1148, 1153 (9th Cir. 1998) ("Where a prescribed procedure is intended to protect the interests of a party before the agency, even though generous beyond the requirements that bind such agency, that procedure must be scrupulously observed."); *See International House v. N.L.R.B.*, 676 F.2d 906, 911 (2d Cir. 1982) ("The application of due process to NLRB proceedings, like other administrative proceedings, is not novel."). As the Eleventh Circuit Court of Appeals held:

> It is well-established that when an agency establishes rules to govern its proceedings, these rules must be scrupulously observed. It is equally well-established that it is a denial of due process for any government agency to fail to follow its own regulations providing for procedural safeguards to persons involved in adjudicative processes before it.

Kabeller, Inc. v. Busey, et al., 999 F.2d 1417, 1419 (11th Cir. 1993) (citations omitted); *See Associated Builders & Contractors of Texas Gulf Coast, Inc. v. U.S. Dept. of Energy*, 451 F. Supp. 281 (S.D. Tx. 1978) ("Procedural due process requires the government to adhere to its own rules."). An agency's failure to follow its own rules renders a decision in violation thereof invalid. *United States v. Nixon*, 418 U.S. 683 (1974); *See Hupart v. Board of Higher Ed., City of New York*, 420 F. Supp. 1087, 1106 (S.D.N.Y. 1976) ("An agency of the government must scrupulously observe rules, regulations, or procedures which it has established. When it fails to do so, its action cannot stand and courts will strike it down.").

The competing doctrines of administrative deference and due process protection are at the core of the question before the Court. In *Fay*, the Second Circuit attempted to strike a balance by recognizing that representation matters are within the purview of Board authority, but that a violation of Constitutional rights supports district court jurisdiction to offer a remedy. The balance tilts in ILA's favor because, as in *Leedom v. Kyne*, ILA has no alternative remedies. *See Board of Governors of the Federal Reserve System v. M Corp. Financial Inc., et al.*, 502 U.S. 32 (1991) ("First, central to our decision in *Kyne* was the fact that the Board's interpretation of the Act would wholly deprive the union of a meaningful and adequate means of vindicating its statutory rights."). Due process principles should override administrative deference, particularly when the administrative agency provides no alternative method for review. *See Bivines v. Bowen*, 833 F.2d 293, 296 (11th Cir. 1987) ("[T]he deference which we accord administrative agencies is tempered by the fact that our duty to protect due process and fundamental fairness is paramount to the

agency's otherwise untrammeled right to implement its self-promulgated procedures."); *Call v. Heckler*, 647 F. Supp. 560, 563 (D. Mont. 1986) ("The courts, to protect due process, must be particularly vigilant and must hold agencies . . . to a strict adherence to both the letter and the spirit of their own rules and regulations.") (citing *Powell v. Heckler*, 789 F.2d 176, 178 (3d Cir. 1986)); *See also Atkinson Lines, Inc. v. United States*, 381 F. Supp. 39, 41 (S.D. Oh. 1974) (holding that deference to an administrative agency "must not be viewed as an abdication by the courts of an obligation to scrutinize carefully agency rulings and reverse those that do not comport in the due process or with fundamental justice"). *First Fed. Sav. and Loan Assoc. of Lincoln v. Casari*, 667 F.2d 734, 740 (8th Cir. 1982) ("As noted by the court, even where otherwise withdrawn, judicial review of administrative agency determinations is always available to assure agency compliance with internal procedures."); *Graham v. Caston*, 568 F.2d 1092, 1097 (5th Cir. 1978) ("Judicial review is available where [an] administrative agency fails to follow procedures outlined in regulations adopted by that administrative agency.").

If the Board followed its own rules here, it would have denied review of the Acting Regional Director's Decision and Direction of Election, counted the ballots, and recognized the employees' free choice. By disregarding its self-imposed limitation and by granting review merely because it disagreed with the Acting Regional Director, the Board undermined the Act.

II. WHETHER THE BOARD'S RULES AND REGULATIONS SHOULD BE TREATED AS STATUTORY MANDATES FOR APPLYING *LEEDOM v. KYNE* IS UNRESOLVED.

In *Leedom*, this Court held that the Board's violation of an express statutory mandate supports district court jurisdiction. This Court should address whether the Board's internal procedural rules should be equated to statutory mandates for purposes of applying *Leedom*. Although various courts have rejected this theory, at least one district court has advanced this exact principle. As explained in *Weingarten, Inc. v. Potter*, 233 F. Supp. 833, 835 (S.D. Tx. 1964):

> Since the rules and regulations and statement of procedure of the National Labor Relations Board . . . were enacted pursuant to authority delegated to the Board by Congress in 29 U.S.C. Section 156, those particular rules which are substantive **have the dignity of statutory enactments for the purpose of *Leedom v. Kyne*. Consequently, a United States District Court has jurisdiction to set aside action by a regional director contrary to a specific prohibition** in one these substantive rules. . . . The National Labor Relations Board having issued a specific rule containing certain prohibitions to cover a particular situation, **neither it nor its regional directors may in the exercise of discretion act contrary to the rule**.

(emphasis added).

ILA alleged that the Board violated its rules by disregarding the finality of the Acting Regional Director's Decision and Direction of Election and reviewing it on grounds other than one of the four enumerated categories set forth in Section 102.67. Rather than identify any of the categories, the Board instead declared that there existed "substantial issues warranting review." This enabled the Board to then engage in *de novo* review and to disagree with the final Decision and Direction of Election. This Court should address whether this violation supports district court jurisdiction under *Leedom*.

III. A UNION SHOULD HAVE THE RIGHT TO DECLARATORY RELIEF BECAUSE THE PRINCIPLE OF NON-REVIEWABILITY WAS CREATED TO PROTECT UNIONS AND EMPLOYEES.

The principle of non-reviewability relied upon by the district court in dismissing ILA's complaint originated as a method of protecting employees when a labor union prevailed in a representation proceeding — not to protect the employer. *See Catalytic Industries Maintenance Company*, 333 F. Supp. at 536; *see also Hartz Mountain Corp. v. Dotson*, 727 F.2d 1308 (D.C. Cir. 1984). As the Second Circuit Court of Appeal observed in *Goethe House New York, German Cultural Center v. N.L.R.B.*, 869 F.2d 75 (2d Cir. 1989):

> As an employer, Goethe House has the option of seeking indirect review of the Board's order by refusing to bargain with the union if it is certified, and then seeking review of its position in a court

> of appeals. In *[Leedom v.] Kyne*, by contrast, the Plaintiff in the District Court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action. **Because indirect review was unavailable in *Kyne*, the case for direct review was more compelling.**

Id. at 80 (emphasis added).

Declaratory relief should be recognized as a vehicle for reviewing the Board's representation decision because it does not implicate the concerns which spawned the principle of non-reviewability, such as dilatory tactics which would interfere with elections or the bargaining process. In *Florida Board of Bus. Reg., Division of Pari-Mutual Wagering v. N.L.R.B., et al.*, 686 F.2d 1362 (11th Cir. 1982), the State of Florida filed a district court action to enjoin a scheduled election by a certified bargaining unit and to obtain a declaratory judgment that the Board lacked authority over labor disputes involving jai-alai players. The Board argued that the district court was powerless to render a decision relating to a representation proceeding. However, the reviewing court disagreed, reiterating that non-reviewability was created as a shield to protect the rights of a labor union and employees, not as a sword upon which to impale them:

> The extraordinary circumstances [*Leedom v. Kyne*] rule was fashioned to deal with time-consuming pre-election challenges to board orders which unduly delayed the choice of employee representations. When Congress passed the Act in 1935, it was particularly concerned that board-

> ordered representation elections be held post-haste. When employee organization has built up its membership to a point where it is entitled to be recognized as a representative of the employees for collective bargaining, and the employer refuses to accord such recognition, **the union, unless an election can promptly be held to determine the choice of representation, runs the risk of impairment of strength by attrition and delay while the case is dragging on through the courts.**

Id. at 1368 (emphasis added). The Court concluded that the district court had subject matter jurisdiction under 28 U.S.C. § 1331:

> The state contends, and we agree, that **a plaintiff who cannot seek review of the board's order in the court of appeals but who claims that the board violated his federal rights has the right to repair to the district court under any statute that may grant the district court the power to hear his claim.**

Id. at 1370 (emphasis added). As one author, commenting on the Eleventh Circuit's decision, explained:

> The Eleventh Circuit noted that the Act's legislative history and the extraordinary circumstances rule limit district court jurisdiction when an employer or a rival union attempts to use a district court to delay a board-ordered election. The Court reasoned that a suit for declaratory

> relief would not permit the use of the dilatory tactics the legislature sought to avoid by limiting judicial review.

Union Access to the Courts on NLRB Representation Decisions: The Potential for Declaratory Judgment Procedure to Provide Review, 37 Cath. U.L. Rev. 119, 139 F. Frio. Therefore, a pending question exists regarding federal law as to whether the concept of non-reviewability conceived to protect employees and unions should be applied as a means of preventing them from obtaining review and declaratory relief. This Court should grant the requested Petition to resolve this and the other unresolved federal questions.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED JANUARY 17, 2002

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-12067

D.C. Docket No. 00-02003-CV-JLK

LONGSHOREMAN, INTERNATIONAL LONGSHOREMAN'S ASSOCIATION LOCAL 1922,

Plaintiffs-Appellants,

versus

NATIONAL LABOR RELATIONS BOARD, SEABOARD MARINE, LTD.,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida

(January 17, 2002)

Before MARCUS, FAY and WINTER*, Circuit Judges.

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* Honorable Ralph K. Winter, Jr., U.S. Circuit Judge for the Second Circuit, sitting by designation.

Appendix A

PER CURIAM:

AFFIRMED. *See* 11th Cir. R. 36-1**

** 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) judgment has been entered without a reversible error of law; and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA, MIAMI DIVISION DATED MARCH 14, 2001 AND FILED MARCH 19, 2001

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 00-2003-CIV-KING

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922,

Plaintiff,

v.

NATIONAL LABOR RELATIONS BOARD AND SEABOARD MARINE LIMITED,

Defendants.

ORDER GRANTING DEFENDANTS' MOTIONS TO DISMISS AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

THIS CAUSE comes before the Court upon Defendant National Labor Relations Board's Motion to Dismiss Amended Complaint for Declaratory Judgment filed November 27, 2000 and Defendant Seaboard Marine Limited's Motion to Dismiss Amended Complaint for Declaratory Judgment filed December 8, 2000. Plaintiff

Appendix B

International Longshoreman's Association, Local 1922 ("Local 1922"), filed a Response on January 8, 2001. Defendant Seaboard Marine Limited ("Seaboard") filed a Reply on January 19, 2001. Defendant National Labor Relations Board ("NLRB" or the "Board") filed a Reply on March 2, 2001.

Seaboard is a business that transports cargo between the United States and various destinations in the Americas. Seaboard conducts part of its shipping business at the Port of Miami and stores cargo in the 36th Street Yard. (*See* Amend. Compl. 3). Local 1922 is a labor union affiliated with the International Longshoreman's Association, AFL-CIO. On November 25, 1997, Local 1922 filed a petition with the NLRB to designate certain classes of Seaboard's employees as a unit for collective bargaining purposes. (*See* Amend. Compl. ¶18). Local 1922 petition covered 17 employees from three job classifications. Seaboard filed objections to Local 1922's petition on the grounds that the only appropriate bargaining unit was a wall-to-wall, including about 198 employees from fifteen job classifications. The NLRB Acting Regional Director conducted an evidentiary hearing on December 12, 1997 to determine the appropriate bargaining units. The Acting Regional Director concluded that the 17 employees of the three job classification shared a sufficient community of interest and certified them as a unit. (*See* Amend. Compl., Ex. A, NLRB Decision Dated January 9, 1998). Seaboard filed a timely request for the NLRB to review its Acting Regional Director's decision. On February 4, 1998, the NLRB granted Seaboard's request stating that the Acting Director's decision "raises substantial issues warranting review.") (Amend. Compl. Ex. B, February

4, 1998 NLRB Order). On February 5, 1999, the NLRB reversed the Acting Regional Director's decision and vacated the election held on February 5, 1998. The NLRB remanded the case to the Regional Director to determine the appropriate unit for collective bargaining, the adequacy of the Local 1922's showing of interest in such a unit and the scheduling of a new election. (*See* Amend. Compl., *Seaboard Marine, Ltd.*, 327 NLRB 108 (1999)). The NLRB found that the Acting Regional Director's decision was contrary to "well established [NLRB law] that the Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis." (*Id.*). On March 26, 1999, the Regional Director issued a Supplemental Decision and Direction of Election in which she concluded that the only appropriate unit was an overall unit of employees. (*See* Amend. Compl., Ex D., Supplemental Decision). Local 1922 requested for the NLRB to review the Acting Director's Supplemental Decision. However, the NLRB denied Local 1922 request for failure to raise any issues warranting review. (*See* Amend. Compl., Ex. E).

Local 1922 filed suit on June 6, 2000 and amended its Complaint on October 16, 2000 against NLRB and Seaboard. In Local 1922's Amended Complaint for Declaratory Judgment, it seeks declaratory judgments pursuant to 28 U.S.C. § 2201 that the NLRB violated its own rules and regulations and statutory directives by reviewing and/or reversing a decision by the Acting Regional Director in a representation case and that the NLRB violated Local 1922 and Seaboard employees' constitutional due process rights by denying Seaboard's employees the right to select a bargaining representative as authorized under the Nation

Labor Relations Act. Specifically, Local 1922 requests that this Court reinstate the NLRB's Acting Regional Director original decision that the trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks are an appropriate unit for bargaining purposes and recognize the ballots from the election held on February 15, 1998 as the true expression of the unit members' will. The NLRB moves for dismissal of the Amended Complaint on the grounds that this Court lacks subject matter jurisdiction over the Local 1922 claims, for failure to state a claim upon which relief can be granted and for failing to comply with Fed.R.Civ.P. 10(b). Seaboard seeks dismissal of the Amended Complaint on the same grounds as NLRB moves.

II. Legal Standard

Dismissal is justified only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 810 (1993) (quoting *McLain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, 246 (1980)). The complaint at issue should be construed in the light most favorable to the plaintiff, and all facts alleged by the plaintiff are accepted as true. *See Hishon*, 467 U.S. at 73. Regardless of the alleged facts, however, a court may dismiss a complaint on a dispositive issue of law. *See Marshall County Bd. of Educ. v. Marshall County Gas Dist.*, 992 F.2d 1171, 1174 (11th Cir. 1993).

Appendix B

III. Discussion

Under 29 U.S.C. § 159(b), the NLRB has the authorization and responsibility to determine what constitutes an appropriate bargaining unit.[1] The NLRB has exclusive jurisdiction over questions regarding representation. *See Minn-Dak Farmers Coop. Employees Org. v. Minn-Dak Farmers Coop.*, 3 F.3d

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1. Section 159(b) of the National Labor Relations Act states that:

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

1199, 1201 (8th Cir. 1993). It is settled law that NLRB decisions regarding representations are generally directly non-reviewable by district courts except in certain limited circumstances. Federal courts have recognized three circumstances where federal jurisdiction exists over representation matters. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 1963, 372 U.S. 10, 17 (1963) (finding federal jurisdiction where "public questions particularly high in the scale of our national interest because of their international complexion.") *(Id.* at 17); *Milk & Ice Cream Drivers' Union, Local 98 v. McCulloch*, 306 F.2d 763 (U.S. App. D.C. 1962) (federal jurisdiction exists where the NLRB has violated a constitutional right of the complaining party); *Leedom v. Kyne*, 358 U.S. 184 (1958) (finding federal jurisdiction where the NLRB had clearly acted "in excess of its delegated powers and contrary to a specific prohibition in the Act.") *Id.* at 188. In *Boire v. Greyhound Corp.*, 376 U.S. 473, 476-77 (1964), the Court held that "[t]he [Leedom v.] Kyne exception is a narrow one, not to be extended to permit plenary district court review of Board orders in certification proceedings whenever it can be said that an erroneous assessment of the particular facts before the Board has led it to a conclusion which does not comport with the law." *Id.* at 481. Local 1922 only relies on the constitutional deprivation and *Leedom v. Kyne* exception as ground for this Court's jurisdiction.

NLRB argues that Local 1922 claims do not meet any of the exceptions for the Court to exercise jurisdiction. On the other hand, Local 1922 argues that its constitutional right as codified in 29 U.S.C. § 157 for "[e]mployees shall have the right to self-organization, to form, join, or assist labor

organizations, to bargain collectively through representatives of their own choosing" has been violated by Seaboard employees' ability to determine their own representatives. In response, NLRB contends that Local 1922 failed to make a clear and strong showing that the NLRB violated Local 1922 constitutional rights. This Court agrees.

Next, Local 1922 argues that the *Leedom v. Kyne* exceptions applies here because the NLRB acted in excess of "clear and mandatory" statutory provisions by not articulating a reason for reviewing the Acting Regional Director's decision as required by 29 C.F.R. 102.67(c)[2] and exceeded its authority by reviewing the Acting Regional Director's decision. Local 1922's Amended Complaint does not allege that the NLRB violated a clear and mandatory statutory provision as required for the *Leedom v. Kyne* exception. This Court finds that Local 1922 failed to meet to *Leedom v. Kyne* exception because under 29 U.S.C. § 159(b) the NLRB has discretion to determine appropriate bargaining units. *See Computer Sciences Corp. v. NLRB*, 677 F.2d 804,

2. (c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds: (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent. (2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party. (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error. (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

807 (11th Cir. 1982). The instant case involves representation matters, which are within the exclusive jurisdiction of the NLRB. The NLRB is not mandated by statute to state specific reasons when it decides to grant review of a NLRB representation decision. *See NLRB v. Sav-On-Drugs, Inc.*, 709 F.2d 536 (9th Cir. 1983). Moreover, the NLRB found that the Acting Regional Director's decision "raises substantial issues warranting review" in its February 4, 1998 NLRB Order and concluded that the Acting Regional Director's decision was contrary to established law. Hence, the NLRB complied with its rules and regulations.

IV. Conclusion

Therefore, this Court concludes that it lacks subject matter jurisdiction over Local 1922 claims.

Accordingly, after a careful review of the record, and the Court being otherwise fully advised, it is

ORDERED and ADJUDGED that Defendant National Labor Relations Board's Motion to Dismiss Amended Complaint and Defendant Seaboard Marine Limited's Motion to Dismiss Amended Complaint be, and the same are hereby, GRANTED. All other pending Motions are hereby DENIED as MOOT. It is further

ORDERED and ADJUDGED that the above-styled be, and the same is hereby, DISMISSED with prejudice.

Appendix B

DONE and ORDERED in chambers at the James Lawrence King Federal Justice Building and United States District Courthouse, Miami, Florida, this 14th day of March, 2001.

s/ James Lawrence King
JAMES LAWRENCE KING
U.S. DISTRICT JUDGE
SOUTHERN DISTRICT OF FLORIDA

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APPENDIX C — DECISION AND DIRECTION OF ELECTION OF THE UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12 DATED JANUARY 9, 1998

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-8176

SEABOARD MARINE, LTD.[1]

Employer

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1922, affiliated with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing was held before a hearing officer of the National labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

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1. The name of the Employer appears as amended at the hearing.

Appendix C

Upon the entire record in this proceeding,[2] the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. Petitioner is a labor organization within the meaning of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The parties are in disagreement as to the scope and composition of the unit. The Petitioner seeks a bargaining unit limited to trailer interchange clerks, vehicle and equipment receiving clerks and equipment control clerks

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2. The briefs submitted by Petitioner and Employer have been carefully considered.

3. The Employer is a Liberian corporation licensed to do business in the State of Florida, with an office and place of business located at the Port of Miami, Florida, where it is engaged in the business of transporting cargo inside and outside the State of Florida. During the past 12 months, the Employer, in conducting its business operations derived gross revenues in excess of $50,000 for the transportation of cargo from the State of Florida directly to points outside the State of Florida.

employed by the Employer solely at its Port of Miami terminal. Contrary to the Petitioner, the Employer contends that in addition to the trailer interchange clerks, vehicle and equipment receiving clerks and equipment control clerks petitioned-for, the only unit appropriate for bargaining must also include all remaining employees of the Employer at both the Port of Miami terminal and at its 36th Street location, including power mechanics (including welders), reefer mechanics, trailer mechanics (including maintenance employees), tiremen, parts and purchasing clerks, boarding agents, equipment operators, stevedore coordinators, inbound coordinators, claims clerks, dispatch employees (including clock drivers, dispatchers, and compliance clerks), and vehicle shuttlers. The Petitioner would proceed to an election in any alternate unit if the Board determines that the petitioned-for unit is inappropriate. The petitioned-for unit includes about 17 employees while the unit urged by the Employer would include about 198 employees.

The Employer is engaged in the business of transporting cargo[4] for importer and exporter customers between the United States and primarily Central America, South America and the Caribbean. The Employer has its administrative office[5] in Medley, Florida. The Employer's shipping operation is conducted on approximately 50 acres at the Port of Miami,

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4. Cargo transported by the Employer includes dry goods, perishables, heavy equipment and vehicles which are shipped in refrigerated or dry containers and trailers or on flat-bed trailers, in open containers or with no containers.

5. Neither party seeks to include any classification of employees who work out of the Employer's administrative office.

hereinafter called the terminal, and, since 1991, has expanded its operation to a 25-acre piece of land, hereinafter called the 36th Street Yard,[6] located "a couple of miles" from the terminal. The Employer owns or leases over 22,000 pieces of equipment for its operation: equipment that holds cargo,[7] equipment that moves cargo,[8] and equipment necessary to maintain the aforementioned operational equipment. The Employer is not involved in the direct loading or unloading of customer cargo onto or off of seagoing vessels; rather, a separate stevedoring company is employed for this operation.

The Employer's vice-president of operations, Tom Paelinck, who has an office located in the terminal, has overall responsibility for the transportation operation at the terminal and the 36th Street Yard. At the terminal; each of the 15 classifications urged by the Employer in a wall-to-wall unit has separate supervision. At the 36th Street Yard, one foreman supervises the mechanics and one foreman supervises the remaining employees assigned to that location; both foreman

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6. The 36th Street Yard is an expansion of the Employer's terminal operation necessitated by the Employer's increased workload and lack of available space at the terminal. The 36th Street Yard is used primarily for the storage of empty trailers and the overflow of empty containers returned from overseas which are in excess to those needed at the terminal. The 36th Street Yard is also utilized by the Employer for the repair of empty containers and trailers. No imported or exported cargo is received or housed at the 36th Street Yard.

7. Equipment that holds cargo includes containers, trailers, reefers (refrigerated containers or trailers), chassis and flatbeds.

8. Equipment that moves cargo includes forklifts, trucks, top-loaders, cranes and "mule" trucks (specially designed short trucks).

report to one supervisor, Juan "Pepe" Gonzales. Vice-President of Operations Paelinck testified that the stipulated supervisors at the terminal and stipulated supervisor Gonzales from the 36th Street Yard report to him.[9]

There are employees in all 15 classifications the Employer seeks to include in the unit, including the three petitioned-for classifications, who perform duties at the terminal. Additionally, employees in some of these classifications perform their duties at the 36th Street Yard. The functions of those classifications, as established in the record, are as follows:

1. **Vehicle and Equipment Receiving Clerks:** Six vehicle and equipment receiving clerks (also referred to as checkers), hereinafter called V/E clerks, are separately supervised by stipulated supervisor Carol Ehrlich. V/E clerks physically work in the car lot located directly across the street from the entrance of the terminal. Customers deliver their vehicles to a "vehicle lane" in the car lot for export by the Employer. In the "vehicle lane" V/E clerks prepare a "dock receipt;" inspect the vehicle to insure it is running and that the brakes work; note any damage, defects or missing equipment; measure the vehicle; and then enter this information into the computer system via a computer terminal which is located in an adjacent office. The V/E clerks then move the vehicle to an area of the car lot designated by port of destination.

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9. Vice-President of Operations Paelinck testified that a "terminal manager" position was vacant and that Operations Manager Tim Dzierzanowski had an office next to Paelinck's at the terminal. There is no evidence as to the duties of the "terminal manager". Paelinck only testified that the operations manager spends 70 to 80 percent of his time "managing the vessels" and that he "completes the evaluations of the equipment operators at the terminal."

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V/E clerks also receipt and inspect heavy equipment. Customers deliver heavy equipment to a side gate at the terminal. On a rotational basis, all V/E clerks perform the receipt and inspection of heavy equipment. When heavy equipment is delivered, V/E clerks prepare the dock receipt, wait while an equipment operator unloads the heavy equipment onto the ground, and then inspect and measure the equipment. Upon completion of the inspection, V/E clerks return to the car lot and input the information into the computer system.

2. Trailer Interchange Report Clerks: Eight trailer interchange report clerks (also referred to as TIR checkers), hereinafter called TIR clerks, are separately supervised by stipulated supervisor Juan Carlos Perara. TIR clerks physically work in and rotate between two garage-like drive-through facilities, hereinafter called the "outbound" TIR lanes and the "inbound" TIR lanes. Use of the "outbound" TIR lanes is required for trucks/equipment exiting the terminal and use of the "inbound" TIR lanes is required for trucks/equipment entering the terminal. Immediately adjacent to each TIR lane is a glass enclosed office where a computer terminal is located. One TIR clerk stands in each TIR lane to inspect trucks/equipment moving through and one TIR clerk inputs inspection data into the computer terminal located inside the office. Truckers, when exiting the terminal with empty equipment requested by an exporter customer's "pick-up" booking or with loaded equipment destined for delivery to an import customer, must drive through the "outbound" TIR lane. The trucker hands the TIR clerk a Trailer Interchange Report, hereinafter called a TIR, which the trucker has obtained from a dispatcher. The TIR clerk takes information off the equipment and notes it on the TIR

and verifies the accuracy of equipment type. To determine whether the truck/equipment is "roadworthy", the TIR clerk performs a visual inspection of the truck and equipment for obvious mechanical and structural deficiencies or damage such as broken tail or indicator lights, the condition of the tires and mud flaps, the validity of license plates, the currency of the required annual highway inspection, and any obvious tears or rips in the container. The TIR clerk records his observations onto the pre-printed TIR form. While performing this inspection, a tireman is inflating the truck/equipment's tires to the required level. The record establishes that TIR clerks may perform minor repairs such as replace broken tail lights, replace crank handles for landing gear, affix tape over small tears, install necessary placards and remove or spray paint over unnecessary placards, and replace expired license plates. Supplies needed to perform the aforementioned repairs are maintained in a cabinet within the glass-enclosed office adjacent to the TIR lane. Repairs which exceed the skill level associated with the aforementioned tasks are performed by either a reefer mechanic, trailer mechanic, or power mechanic. TIR clerks note needed repairs onto the TIR and then use a two-way radio to request that a mechanic respond to perform the needed repairs. Depending upon the type of repair needed, a reefer mechanic, trailer mechanic, or power mechanic will respond to the "outbound" TIR lanes. It appears from the record that if the repair can be made quickly, the mechanic completes the repair in the TIR lane; however, if the repair will impede the flow of advancing trucks/equipment, the mechanic will perform the repair outside of the TIR lanes. A similar inspection, this time for "seaworthiness" is performed by the TIR clerk in the "inbound" TIR lanes for truck/equipment entering the terminal.

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3. Equipment Control Clerks: Five equipment control clerks (also referred to as ship checkers) are separately supervised by stipulated supervisor Valentina Marrero. The equipment control clerks work out of an equipment control trailer and maintain the inventory of equipment owned or leased by the Employer through its computer system. Three of the equipment control clerks spend approximately 80 percent of their time physically standing on the "string piece"[10] next to a vessel and recording the identification numbers of cargo and equipment being loaded or unloaded onto or from the vessel, either through use of a hand-held computer and/or a clipboard with the stow plan or manifest, for inventory tracking purposes. The remainder of the three equipment control clerks' time is spent in the equipment control trailer performing related equipment inventory tasks and reconciling discrepancies in equipment location. Conversely, the remaining two equipment control clerks occasionally perform the above-described ship-side function and spend the remainder of their time in the equipment control trailer performing related equipment inventory tasks and reconciling discrepancies in equipment location. The two equipment control clerks working in the trailer assist the equipment control clerks performing the ship-side function by inputting their data when back-to-back vessels are being loaded and unloaded and they have insufficient time to complete their data entry into the computer system.

4. Vehicle Shuttlers: Six vehicle shuttlers are separately supervised by stipulated supervisor Thomas Hernandez.

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10. The "string piece" is an approximately 150 foot strip of land adjacent to the waters edge where cargo is "staged" prior to being loaded onto the awaiting vessel.

Appendix C

When a ship arrives, vehicle shuttlers drive the vehicles from the car lot across the street to the terminal to the "string piece" for loading. Vehicle shuttlers may "stuff" the vehicle into a container and secure it with binders as directed by their supervisor; a "stuffing report" is completed by the supervisor. Vehicle shuttlers may assist equipment operators "in a learning process" on weekends and during peak need.

5. Dispatch employees (Dispatchers, Clock Drivers, and Compliance Clerk): Five dispatchers, five clock drivers, and one compliance clerk are supervised by stipulated supervisors Armando Rodriquez and Ciro Cordero. The dispatchers receive computer-generated dispatch instructions from the main office, print a TIR, and give the TIR to an available independent truck driver[11] who is in the area looking for work. The dispatcher may give the TIR to a "clock driver", an hourly paid employee of the Employer, when the booking is for a customer requiring multiple location loadings or when the booking involves special "bonding" requirements. Clock drivers pick up the requested equipment from the designated area of the terminal or 36th Street Yard, proceed to the "outbound" TIR lanes for inspection, drive to the customer's location, await the filling of the load, generate a TIR for the next load, and when completed, return the loaded equipment back to the terminal for inspection in the "inbound" TIR lanes. Upon completion of the inspection, clock drivers drive the cargo to the designated location at the terminal where an equipment operator off-loads the cargo. The compliance clerk

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11. The Employer contracts with approximately 80 truck drivers who are independent contractors and thus not employees of the Employer. Neither party is seeking to include the independent truck drivers in any unit found appropriate.

works in the dispatch office and is responsible for insuring that all drivers are in compliance with highway regulations.

6. Boarding Agents: Four boarding agents are separately supervised by stipulated supervisor Susan Aronov. Boarding agents coordinate a ship's arrival with the U.S. Customs, the U. S. Coast Guard, the pilot station, and the Port Authority. Boarding agents are the first employees of the Employer to board an incoming vessel. Boarding agents perform unspecified clerical aspects of preparing for the ship's arrival.

7. Inbound Coordinators: Fourteen inbound coordinators are separately supervised by stipulated supervisors Soli Chiu, Teodoro Bruns, Marta Donnelly, and Ana Chao. Inbound coordinators obtain an incoming ship's manifest (a detailed list of the cargo and containers onboard the ship) prior to the ship's arrival and enter the data from the manifest into the Employer's computer system. Simultaneously, the inbound clerks notify customers of the expected arrival time of their cargo. Inbound clerks coordinate with the U. S. Department of Agriculture (USDA) for its inspection of all incoming reefers. When fumigation of the reefer is required by USDA, inbound clerks contact a dispatcher who will arrange for a clock driver to move the reefer to the fumigation company operating within the terminal. When other incoming containers are selected by U.S. Customs for inspection, the inbound clerks coordinate by radio with the dispatchers to have the container moved by clock drivers to Custom's facility for inspection.

8. Claims Clerks: Three claims clerks are separately supervised by stipulated supervisor Ingrid Cotes. The claims clerks are located in an office next to the inbound coordinators

and process all claims of damaged cargo. Claims clerks contact an equipment operator by radio to coordinate the placement of damaged cargo for inspection. A claims clerk is present when a surveyor and the customer inspect the damaged cargo. The claims clerk photographs the damaged cargo and initiates a damage report. The claims clerk obtains backup paperwork relevant to the cargo, i.e. TIR reports, dock receipt, reefer report to evaluate the liability for the claims. Claims clerks maintain files on all drivers, ensure that each driver is properly insured to haul cargo, and ensure that master TIR agreements are on file for each driver.

9. Parts and Purchasing Clerks: Six parts and purchasing clerks are separately supervised by stipulated supervisors Carlos Rodriguez and Rudolfo Reyes. They physically work in an area adjacent to dispatch. Parts and purchasing clerks order, receive, check and inventory parts and materials for all terminal operations, including seals for containers. They are responsible for keeping an up-to-date inventory of all parts and materials needed for terminal operations. Parts and purchasing clerks disburse parts and materials to all departments on an as needed basis.

10. Stevedore Coordinators: Four stevedore coordinators are separately supervised by stipulated supervisor Fernando Delgato. Stevedore coordinators are located in a trailer in the terminal. Based upon computer-stored "booking" data, stevedore coordinators develop a "stow plan" depicting where cargo scheduled for an outbound vessel will be placed aboard the vessel. Stevedore coordinators work closely with the equipment operators as they move the containers, trailers, reefers, and chassis to the string piece alongside the vessel. When problems arise with locating

scheduled cargo or with placement of scheduled cargo safely on the vessel, the stevedore coordinators may contact mechanics, TIR clerks, or equipment operators for relevant information. Stevedore coordinators assist equipment control clerks in resolving discrepancies between the stow plan and cargo actually loaded onto the vessel.

11. Equipment operators: Thirty-seven equipment operators are separately supervised by stipulated supervisors Joseph Cruz, Gerardo Palomo, Albert Smalls, Jr., Manuel Florian and Richard Deroxtro. Four teams of six equipment operators, one of whom on the team is designated as the "header" of the team, move equipment within the terminal. The teams are assigned to staggered shifts and are responsible for moving ("staging") scheduled cargo from its designated location in the terminal to the string piece beside their assigned outgoing vessel. "Headers" obtain a copy of the stow plan for their teams' assigned vessel from the stevedore coordinator and distribute assignments to the equipment operators so that cargo will be staged in the proper sequence. Equipment operators will also unload heavy equipment delivered by customers to the terminal side gate. Equipment operators use forklifts, top-loaders or cranes to remove a container from the chassis or use a "mule" to position trailers, chassis or reefers within the terminal.

12. Tiremen: Three tiremen are separately supervised by stipulated supervisor Manuel Alvarez. One of the tiremen works within the "outbound" TIR lane inserting equalized pressure into truck and trailer tires prior to the rig traveling on public roads. The remaining two tiremen perform tire repair within the tire repair building adjacent to the "inbound" TIR lane.

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13. Power mechanics (including welders): Thirteen power mechanics are separately supervised by stipulated supervisors Raoul Arcia and Castor Garcia. Power mechanics perform maintenance on the Employer's equipment used to move cargo, (i.e. "mules", forklifts, and toploaders) and on some cargo such as used busses/trucks being shipped overseas to make them self-propelled. Unlike reefer and trailer mechanics, power mechanics are not provided the use of step vans out of which to work. The record does not disclose the principal location within the terminal where power mechanics perform their work.

14. Reefer mechanics: Twenty-three reefer mechanics are separately supervised by stipulated supervisors Clyde Wingate, Steven Tzoumas, and Juan Urbina. Reefer mechanics inspect and maintain refrigerated trailers and containers. Reefer mechanics drive step vans which contain needed tools and equipment to perform their repairs throughout the terminal. Reefer mechanics monitor refrigerated cargo awaiting shipment every six hours to insure that the required refrigeration level is maintained so as to avoid spoilage.

15. Trailer mechanics: Fifteen trailer mechanics are separately supervised by stipulated supervisor Juan Rodriguez. Trailer mechanics inspect and repair containers, reefers, chassis or trailers for general structural or mechanical problems. Trailer mechanics work throughout the terminal out of step vans which contain needed tools and equipment to perform necessary repairs.

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The 36th Street Yard

At its 36th Street Yard, the Employer employs only 7 of the aforementioned 15 classifications for a total of 38 employees. The seven classifications assigned to the 36th Street Yard are: trailer mechanics, power mechanics (including a welder), reefer mechanics, equipment operators, a clock driver, a TIR clerk, and two dispatchers. The primary function of the 36th Street Yard is to store most empty trailers, store overflow empty containers which are in excess of the immediate need at the terminal, and to perform necessary repairs to empty trailers and containers. No inbound or outbound cargo enters the 36th Street Yard. The record reflects that the duties of each classification assigned to the 36th Street Yard are similar to the duties for that classification at the terminal except for those of the TIR clerk. Thus, at the 36th Street Yard, the TIR clerk completes only the top portion of the TIR and does not perform a visual inspection or record data regarding the mechanical or structural condition of the equipment. Vice-President of Operations Paelinck testified that the TIR clerk at the 36th Street Yard is temporarily assigned to work as a TIR clerk at the terminal to cover for absences approximately once a month.

Uniform Working Conditions/Policies/Practices/Wage Scale/Benefits

The Employer's personnel policies and practices for employee complaints, absenteeism, leave of absence, tardiness, sick leave, code of conduct, dress codes, drug and alcohol use, discipline, evaluations, wage increases, and benefits are uniformly applied to all employees. Labor

relations is centralized in a Human Resources Department located at the main office. Work and safety rules are applicable to all employees. All employees at the terminal punch one of two timeclocks. All employees, except for vehicle shuttlers and employees working during their initial 90-day probation, are paid biweekly by the Employer through direct deposit.[12] Beginning wage rates for all classifications range from $8.00 to $10.00 per hour; wage caps for all classifications range from $13.00 to $16.00 per hour. The Employer provides uniforms to employees who work outside of the trailer offices. Blue shirts (pullover or button down) with blue pants are provided employees; supervisors and foremen wear white shirts with blue pants. Employer sponsored activities are open to all employees and one employee newsletter is distributed to all employees.

Permanent Transfers and Temporary Interchange

Human Resource Director Dumkley testified that 91 employees have permanently transferred between classifications. Documentation received in evidence to support her testimony establishes that since 1983 approximately 91 employees transferred between classifications. Of these 91 employees who transferred, only 15 involved petitioned-for classifications. Of those 15, ten (10) took place prior to 1993. Of the remaining five of those transfers, all transfers were between the petitioned-for positions. TIR clerk supervisor Perara testified that TIR clerks had only cross-trained with V/E receiving clerks and that the skills of TIR clerks and V/E receiving clerks were the same. Vice-President of

12. Vehicle shuttlers and employees serving their initial 90 day probationary period are each paid by a temporary agency.

Operations Paelinck testified that equipment control clerks working in the equipment control office provide backup services for the "checkers by the ship" and similar backup services for the TIR clerks.

ANALYSIS AND CONCLUSION

Section 9(b) of the Act states that "the Board shall decide in each case whether, to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, or subdivision thereof."

The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); and *Dezcon. Inc.*, 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Moreover, it is well established that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied 375 U.S. 966 (1964); and *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480

(10th Cir. 1962). In making unit determinations, the Board is required to strike a balance between the competing interests of the union, employer, employees and the public. The Petitioner's desire as to the unit is a relevant consideration, although not dispositive. *See The Lundy Packing Company, Inc.*, 314 NLRB 1042 (1994); *Airco, Inc.*, 273 NLRB 348 (1984). While the Act does not lay down any specific standards for making unit determinations, the Board has developed a number of criteria to be applied in such cases. Foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit. *Continental Baking Co.*, 92 NLRB 777, 782 (1952). The key question is whether the employees have a sufficient community of interest to constitute an appropriate unit. *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 366 (2d Cir. 1964), cert. denied 380 U.S. 910 (1965). As stated by the Board in *Continental Baking*:

> In deciding whether the requisite mutuality exists, the Board looks to such factors as the duties, skills, and working conditions of the employees involved, and especially to any existing bargaining history. [*Continental Baking Co.*, supra at 782-783.]

The community-of-interest test also considers factors such as the degree of functional integration, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); common supervision, *Associated Milk Producers*, 250 NLRB 1407 (1970); employee skills and functions, *Phoenician*, 308 NLRB 826 (1992); interchangeability and contact among employees, *Associated Milk Producers*, supra; and general working

conditions and fringe benefits, *Allied Gear & Machine Co.*, 250 NLRB 679 (1950).[13]

Applying these principles to the instant case, I find that a unit of trailer interchange report clerks, vehicle and equipment receiving clerks, and equipment control clerks working at the Port of Miami terminal only is an appropriate unit for purposes of collective bargaining. As detailed above, the petitioned-for classifications at the terminal have similar duties to receipt, inspect, and record the condition and location of the Employer's equipment and customer cargo as it enters and exits the terminal location. There is no overlap of immediate supervision between the petitioned-for employees and other employees at the terminal. The vice president of operations makes certain final decisions on important personnel matters, such as hiring and discipline. However, there is no record evidence that he provides significant day-to-day direction and supervision to the petitioned-for employees. Further, the only specific evidence in the record of cross training reflects cross training only between the trailer interchange clerks and the vehicle and equipment receiving clerks, not between the requested classifications and any of the other employees. Although the record reflects some employee transfers between non-petitioned-for classifications, no employees in non-

13. At hearing, administrative notice was taken of a July 1, 1988 Decision and Direction of Election in *Seaboard Marine, LTD*, Case 12-RC-6969, involving the same Employer and Petitioner, wherein the Regional Director directed an election in a unit limited to mechanics and mechanics helpers including mechanics' foremen, reefer mechanics, dry trailer mechanics, power mechanics, and body mechanics, welders, tiremen and partsmen. The Employer's Request for Review was withdrawn prior to ruling by the Board. A Certificate of Results issued on August 11, 1988.

petitioned-for classifications transferred into petitioned-for positions during the past four years.

As for the trailer interchange report clerk assigned to the 36th Street Yard, he does not perform the inspection function on the equipment; there is overlap in his immediate supervision with other classifications at the 36th Street Yard and not with those at the terminal; and he is geographically separated from the terminal. The fact that he is temporarily assigned as trailer interchange clerk at the terminal approximately one time per month does not mandate that he be included in the petitioned-for unit.

In view of the above, and noting in particular that no other labor organization seeks to represent the petitioned-for employees in a more comprehensive unit, I find that the Employer's trailer interchange report clerks, vehicle and equipment receiving clerks, and equipment control clerks share a community of interest and that the petitioned-for unit is an appropriate unit for collective bargaining. There is no basis in the record to exclude the equipment control clerks who work primarily in the equipment control trailer from the unit found appropriate herein.[14]

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14. It appears from the record that trailer interchange report clerks, vehicle and equipment receiving clerks, equipment control clerks, as well as all other classifications, while serving their initial 90-day probationary period are paid by a temporary agency and "do not become Seaboard employees" until satisfactory completion of their probation. The unidentified temporary agency was not a party to this representation proceeding. While 90-day probationary employees may be solely employed by the Employer, I cannot determine, based upon the record before me, whether that is the case

(Cont'd)

Appendix C

Birdsall, Inc., 268 NLRB 186 (1983), principally relied upon by the Employer to support its contention that the petitioned-for classifications constitute a fragmented group, rather than an appropriate unit, is distinguishable. In *Birdsall*, where the Board found a unit limited to employees in the employer's warehouse operation inappropriate, the Board relied in large part on the employer's requirement that employees be frequently shifted from one area to another on an ad hoc basis, its temporary inter-area 1- to 3-week transfers as well as "as needed" flexibility, and the employer's extensive orientation procedure where new employees worked in various classifications for a period of time to obtain an overview of the employer's operations. These factors are not present herein. There is no evidence that the Employer herein regularly shifts employees from one work area to another as did the Employer in *Birdsall*. Also, there is no evidence of temporary transfers among the classifications the Employer contends should be included in the unit except those involving petitioned-for employees and the trailer interchange report clerk at the 36th Street Yard discussed above.[15]

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or whether there is a joint employer relationship, and I shall therefore allow the employees in the unit found appropriate who are serving their initial 90-day probationary period to vote subject to challenge. See *Hexacomb Corp.* 313 NLRB 983 (1994); and *Hughes Aircraft Co.*, 308 NLRB 82 (1992).

15. The record is unclear whether overtime work performed by vehicle and equipment receiving clerks as vehicle shuttlers or the overtime work performed by vehicle shuttlers as equipment operators was voluntary or whether they were paid for the overtime work by the temporary agency or the Employer. Even assuming a wall-to-wall unit was found appropriate, vehicle shuttlers may not be included due to the temporary nature of their work.

Finally, there is no evidence of any orientation procedure offered by the Employer except for on-the-job training within the classification into which the employee was hired.

In view of the foregoing and the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All transportation interchange report clerks, vehicle and equipment receiving clerks, and equipment control clerks employed by the Employer at 1306 Port Boulevard, Miami, Florida, but excluding all other employees, guards and supervisors[16] as defined in the Act.

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16. The parties stipulated, and I find, that the following assistant foremen, foremen, and supervisors responsibly direct employees in a manner which is not of a merely routine or clerical nature but which requires the use of independent judgment and are thus excluded from the unit as supervisors within the meaning of Section 2(11) of the Act: Supervisor of trailer interchange clerks — Juan Carlos Perara; Supervisor of vehicle and equipment receiving clerks — Carol Ehrlich; Supervisor of equipment control clerks — Valentina Marrero; Supervisors of power mechanics — Raoul Arcia and Castor Garcia; Supervisors of reefer mechanics — Clyde Wingate, Steven Tzoumas, and Juan Urbina; Supervisor of trailer mechanics — Juan Rodriguez; Supervisor of tiremen — Manuel Alvarez; Supervisors of parts and purchasing clerks — Carlos Rodriguez and Rudolfo Reyes; Supervisor of boarding agents — Susan Aronov; Supervisors of equipment operators — Joseph Cruz, Gerardo Palomo, Albert Smalls, Jr., Manuel Florian, and Richard Deroxtro; Supervisor of stevedore coordinators — Fernando Delgato; Supervisors of inbound coordinators — Soli Chiu, Teodoro Bruns, Marta Donnelly, and Ana

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Appendix C

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.[17] Those eligible shall vote whether or

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Chao; Supervisor of claims clerks — Ingrid Cate; Supervisors of dispatch employees — Armando Rodriguez and Ciro Cordero; Supervisor of vehicle shuttlers — Tomas Hernandez: and Supervisors of employees assigned to the 36th Yard — Juan "Pepe" Gonzales, Miguel Hiedra, and Alexis Jimenez.

17. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their

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not they desire to be represented for collective bargaining purposes by International Longshoremen's Association, Local 1922, affiliated with International Longshoremen's Association, AFL-CIO.[18]

DATED at Tampa, Florida, this 9th day of January, 1998.

Margaret J. Diaz, Acting Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

(Cont'd)
statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Decision and Direction of Election, two (2) copies of an alphabetized election eligibility list, containing the full names and addresses of all eligible voters in the unit found appropriate, shall be filed by the Employer with the Regional Director for Region 12. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office on or before January 16, 1998. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list.

18. Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by January 23, 1998.

APPENDIX D — ORDER OF THE UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DATED FEBRUARY 4, 1998

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 12-RC-8176

SEABOARD MARINE, LTD.

Employer

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1922, affiliated with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

ORDER

Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is granted as it raises substantial issues warranting review.

WILMA B. LIEBMAN, MEMBER

PETER J. HURTGEN, MEMBER

J. ROBERT BRAME III, MEMBER

Dated, Washington, D.C., February 4, 1998.

APPENDIX E — DECISION ON REVIEW AND ORDER REMANDING OF THE REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD DATED FEBRUARY 5, 1999

Case 12–RC–8176

SEABOARD MARINE, LTD.

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1922, affiliated with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

February 5, 1999

BY MEMBERS LIEBMAN, HURTGEN, AND BRAME

On January 9, 1998, the Acting Regional Director for Region 12 issued a Decision and Direction of Election in the above-entitled proceeding, in which the Petitioner seeks to represent a unit limited to approximately 17 employees in three classifications — trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks — employed by the Employer at its Port of Miami terminal facility. The Acting Regional Director found that the petitioned-for unit constitutes a unit appropriate for the purpose of collective bargaining, and ordered an election.

Appendix E

Thereafter, in accord with Section 102.67 of the Board's Rules and Regulations, the Employer filed a timely request for review of the Acting Regional Director's Decision, maintaining that the only appropriate unit is an employerwide or overall unit which would include all of the Employer's approximately 181 employees in an additional 12 classifications who are employed at the Port of Miami terminal or at the Employer's 36th Street location (the Yard). The Petitioner filed a request for review. The election was held on February 5, 1998, and the ballots impounded.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Having carefully considered the entire record, including the Petitioner's Brief on Review, we agree with the Employer that the unit in which the Acting Regional Director has directed an election is not appropriate. It is well established that the Board does not approve fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis. *Colorado National Bank of Denver*, 204 NLRB 243 (1973). In the instant case, we find, contrary to the Acting Regional Director, that the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by the Petitioner is an arbitrary one. See, e.g., *Brand Precision Services*, 313 NLRB 657 (1994); *Transerv Systems*, 311 NLRB 766 (1993).

The employees in the three classifications the Petitioner seeks to represent perform similar unskilled clerical and/or visual inspection tasks as do the employees in a number of

excluded classifications. It is clear from the record that, as the Employer contends, there is a high degree of functional integration in its operations and that the work performed by these employees is directly related to and integrated with the work of the majority, if not all, of the Employer's remaining employees.

The clerk-type and inspection duties of the petitioned-for vehicle and equipment clerks (who prepare "dock receipts" in acceptance of vehicles to be transported, and who visually inspect, and enter data on, these vehicles), trailer exchange clerks (who visually inspect, and enter data on, all trucks and equipment entering or exiting the terminal), and equipment control clerks or "ship checkers" (who inventory equipment and enter identification numbers on all equipment and cargo being loaded or unloaded shipside) are not so dissimilar from the duties of many other classifications to warrant separate representation. In addition, while the various classifications have separate immediate supervision, the Employer maintains a system of wage levels that are applied companywide, as well as fringe benefits, work and safety rules, and personnel policies and practices that are applied uniformly.

Based on the above, we find that, at a minimum, the appropriate unit must also include the following employees who perform similar clerical and inspection tasks: dispatch employees (traffic clerks, dispatchers and driver compliance employees who process booking and equipment information and coordinate customer orders and pickups), boarding agents (who perform various clerical tasks in preparing for ship arrival including the coordination of arrivals with various regulatory agencies), inbound coordinators (who enter data from ship

manifests and notify customers of arrival times), claims clerks (who process all claims of damaged cargo), parts/purchasing clerks (who order/receive/check/inventory parts and materials for all terminal operations), and stevedore coordinators (who develop "stow plans" for outbound vessels).

In rejecting the petitioned-for unit, although we emphasize that the duties and minimal skills of the petitioned-for employees are not distinct from those of several other classifications, we do not suggest a precise unit finding. In particular, we note that the record before us is insufficient to determine whether the appropriate unit also must include the Employer's maintenance employees including mechanics,[1] equipment operators, clock drivers, and vehicle shuttlers.

Accordingly, we reverse the Acting Regional Director's Decision and vacate the election. Because the Petitioner has expressed a willingness to represent employees in any unit the Board finds appropriate, we remand this proceeding to the Regional Director for further appropriate action, including the determination of an appropriate unit for collective bargaining, the adequacy of the Petitioner's showing of interest in such a unit, and the scheduling of a new election.

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1. We note that in Case 12-RC-6969, a unit limited to the Employer's mechanics and mechanic helpers was found appropriate. The Employer's Request for Review of the Regional Director's determination in that case was withdrawn prior to a ruling by the Board.

Appendix E

ORDER

IT IS ORDERED that the election held on February 5, 1998, be vacated, and that the case be remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. February 5, 1999

Wilma B. Liebman, Member

Peter J. Hurtgen, Member

J. Robert Brame III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX F — DECISIONS OF THE UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD, REGION 12 DATED MARCH 26, 1999

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

Case 12-RC-8176

SEABOARD MARINE, LTD.

Employer

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1922, affiliated with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

and

Case 12-RC-8325

SEABOARD MARINE, LTD.

Employer

and

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1416, affiliated with INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

Petitioner

Appendix F

SUPPLEMENTAL DECISION AND DIRECTION OF ELECTION IN CASE 12-RC-8176 AND DECISION AND DIRECTION OF ELECTION IN CASE 12-RC-8325

On January 9, 1998, the Acting Regional Director for Region 12 issued a Decision and Direction of Election in Case 12-RC-8176 finding the petitioned-for unit limited to approximately 17 employees in three classifications — trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks — employed by the Employer at its Port of Miami terminal facility appropriate for collective bargaining purposes and directing an election. Thereafter, the Employer filed a timely request for review of the Acting Regional Director's Decision, maintaining that the only appropriate unit is an employerwide or overall unit which would include all of the Employer's approximately 181 employees in an additional 12 classifications who are employed at the Port of Miami terminal or at the Employer's 36th Street location. The Petitioner, International Longshoremen's Association, Local 1922, affiliated with International Longshoremen's Association, AFL-CIO, hereinafter called Local 1922, also filed a request for review. The election was held on February 5, 1998, and the ballots impounded.

On February 5, 1999, the Board issued a Decision on Review and Order Remanding in Case 12-RC-8176[1], reversing the Acting Regional Director's decision and vacating the election. The Board, finding there is a high

1. *Seaboard Marine, Ltd.*, 327 NLRB No. 108.

degree of functional integration in the Employer's operations and that the work performed by petitioned-for classifications is directly related to and integrated with the work of the majority, if not all of the Employer's remaining employees, held that, at a minimum, the appropriate unit must also include the following employees who perform similar clerical and inspections tasks: dispatch employees (traffic clerks, dispatchers and driver compliance employees), boarding agents, inbound coordinators, claims clerks, parts/purchasing clerks, and stevedore coordinators, hereinafter collectively referred to as "the smallest appropriate unit." The Board ordered that Case 12 RC-8176 be remanded to the Regional Director for further appropriate action to determine whether the appropriate unit must also include the Employer's maintenance employees including mechanics, equipment operators, clock drivers, and vehicle shuttlers.

Thereafter, on February 11, 1999, International Longshoremen's Association, Local 1416, affiliated with International Longshoremen's Association, AFL-CIO, hereinafter called Local 1416, filed a petition in Case 12-RC-8325 seeking to represent a unit limited to equipment operators employed at the Employer's Port of Miami and Port Everglades locations. The Employer's equipment operators sought to be represented by Local 1416 in Case 12-RC-8325 are among the employees the Employer claims to be part of the appropriate unit in Case 12-RC-8176, filed by Local 1922, and are among the employees that were the subject of the Board's remand for the purpose of determining their unit placement.

By Order dated February 18, 1999, the Regional Director consolidated Case 12-RC-8176 and Case 12-RC-8325 and scheduled a hearing to convene on February 25, 1999.

Appendix F

In accordance with the Board's order remanding in Case 12-RC-8176 and upon a petition in Case 12-RC-8325 duly filed under Section 9(c) of the National Labor Relations Act, as amended, a consolidated hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record in this proceeding[2], the undersigned finds:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[3]

3. Petitioners are labor organizations within the meaning of the Act.

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2. The briefs submitted by Petitioners and the Employer have been carefully considered.

3. The Employer is a Liberian corporation licensed to do business in the State of Florida, with an office and place of business located at the Port of Miami, Florida, where it is engaged in the business of transporting cargo inside and outside the State of Florida. During the past 12 months, the Employer, in conducting its business operations, derived gross revenues in excess of $50,000 for the transportation of cargo from the State of Florida directly to points outside the State of Florida.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The parties stipulated that any appropriate unit found in either case 12-RC-8176 or Case 12-RC-8325 should cover the Employer's Port of Miami, Port Everglades, and 36th Street Yard locations. The parties, however, are in disagreement as to the composition of the unit. Petitioner Local 1922 seeks a bargaining unit limited to the smallest appropriate unit as determined by the Board in *Seaboard Marine, Ltd.*, 327 NLRB No. 108 (February 5, 1999). Petitioner Local 1416 seeks a bargaining unit limited to equipment operators. Contrary to the Petitioners, the Employer contends that the only appropriate unit for bargaining is a wall-to-wall unit which encompasses all classifications of employees, excluding office clerical employees, guards and supervisors as defined in the Act.[4] The Petitioners expressed a willingness to represent employees in any unit the Board finds appropriate. The "smallest appropriate unit" as described by the Board includes 58 employees; the petitioned-for unit of equipment operators sought

4. Specifically, the Employer contends that the only appropriate unit must include not only the classifications found by the Board to be the "smallest appropriate unit" — trailer interchange clerks, vehicle and equipment receiving clerks, equipment control clerks, dispatch employees (traffic clerks, dispatchers and driver compliance employees), boarding agents, inbound coordinators, claims clerks, parts/purchasing clerks, and stevedore coordinators — but also maintenance employees, power mechanics (including welders), reefer mechanics, trailer mechanics, tiremen, equipment operators (including headers), clock drivers and vehicle shuttlers.

by Petitioner Local 1416 includes about 55 employees while the unit the Employer contends is appropriate would include about 220 employees. There is no bargaining history among any of the employees at issue herein.[5]

The Employer is engaged in the business of transporting cargo[6] for importer and exporter customers between the United States and Primarily Central America, South America and the Caribbean. The Employer has its administrative office[7] in Medley, Florida. The Employer's shipping operation is conducted on approximately 50 acres at the Port of Miami, hereinafter called the Port of Miami terminal. Since 1991, it has expanded its operation to a 25-acre piece of land,

5. The undersigned takes official notice that in 1988 in Case 12-RC-6969, a unit limited to the Employer's mechanics and mechanic helpers, was found appropriate by the then Regional Director of Region 12. The Employer's Request for Review of the aforementioned determination in that case was withdrawn prior to a ruling by the Board. An election was held and a Certification of Results issued. Subsequently, in 1992 in Case 12-RC-7562, a stipulated election agreement limited to the same unit as found appropriate in Case 12-RC-6969 was approved. Again, an election was held and a Certification of Results issued. Finally, in 1995 in Case 12-RC-7817, a stipulated election agreement limited to various equipment operator classifications was approved. An election was held and a Certification of Results issued.

6. Cargo transported by the Employer includes dry goods, perishables, heavy equipment and vehicles which are shipped in refrigerated or dry containers and trailers or on flat-bed trailers, in open containers or with no containers.

7. No party seeks to include any classification of employees working out of the Employer's administrative office.

hereinafter called the 36th Street Yard,[8] located "a couple of miles" from the Port of Miami terminal, and, since October 1998, has further expanded its operations to include the Port Everglades facility, hereinafter called Port Everglades facility, located approximately 25 miles from the Port of Miami terminal. The Employer owns or leases over 22,000 pieces of equipment for its operation: equipment that holds cargo,[9] equipment that moves cargo,[10] and equipment necessary to maintain the aforementioned operational equipment. The Employer is not involved in the direct loading or unloading of customer cargo onto or off of seagoing vessels; rather, a separate stevedoring company is employed for this operation.

The Employer's director of operations, Edward Gonzalez, who has an office located in the Port of Miami terminal, has overall responsibility for the transportation operation at the Port of Miami terminal, the 36th Street Yard, and the Port Everglades facility. At the terminal, approximately 11 of the 17 classifications the Employer contends should be included in a

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8. The 36th Street Yard is an expansion of the Employer's terminal operation necessitated by the Employer's increased workload and lack of available space at the terminal. The 36th Street Yard is used primarily for the storage of empty trailers and the overflow of empty containers returned from overseas which are in excess to those needed at the terminal. The 36th Street Yard is also utilized by the Employer for the repair of empty containers and trailers. No imported or exported cargo is received or housed at the 36th Street Yard.

9. Equipment that holds cargo includes containers, trailers, reefers (refrigerated containers or trailers), chassis and flatbeds.

10. Equipment that moves cargo includes forklifts, trucks, top-loaders or cranes and "mule" trucks (specially designed short trucks).

wall-to-wall unit have separate supervision.[11] At the 36th Street Yard, one foreman supervises the mechanics and one foreman supervises the remaining employees assigned to that location; both foremen report to one supervisor, Juan "Pepe" Gonzalez. The director of operations testified that the stipulated supervisors at the Port of Miami terminal, stipulated supervisor Gonzalez from the 36th Street Yard, and the stipulated supervisors at the Port Everglades terminal report to him.[12]

There are employees in all 17 classifications the Employer seeks to include in the unit, including the 9 classifications found by the Board to be the "smallest appropriate unit" and the 8 other employee classifications — maintenance, power mechanics (including welders), reefer mechanics, trailer mechanics, tiremen, equipment operators (including headers), clock drivers, and vehicle shuttlers — who perform duties at the Port of Miami terminal. Additionally, employees in some of these classifications are stationed at the 36th Street Yard and at the Port Everglades facility.

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11. As found *infra*, stipulated supervisor Juan Carlos Perara supervises both vehicle and equipment receiving clerks and trailer interchange clerks; stipulated supervisors Armando Rodriguez and Ciro Cordero both supervise dispatch employees and clock drivers; and stipulated supervisor operations manager Maurice Policarpia supervises both boarding agents and equipment operators. However, there is a dispute between the parties as to whether or not "headers" are immediate supervisors of equipment operators.

12. It appears from the record that in July 1998 director of operations Gonzalez replaced vice-president of operations Paelinck, who had testified at the initial hearing in Case 12-RC-8176, and that Maurice Policarpia replaced Tim Dzierzanowski as the operations manager.

Appendix F

"SMALLEST APPROPRIATE UNIT" CLASSIFICATIONS

The functions of those classifications found by the Board in *Seaboard Marine, Ltd.*, 327 NLRB No. 108, to be the "smallest appropriate unit," as established in the record on remand, are as follows:

1. Vehicle and Equipment Receiving Clerks: Six vehicle and equipment receiving clerks (also referred to as checkers), hereinafter called V/E clerks, are supervised by stipulated supervisor Juan Carlos Perara. V/E clerks physically work in the car lot located directly across the street from the entrance of the Port of Miami terminal. Customers deliver their vehicles to a "vehicle lane" in the car lot for export by the Employer. In the "vehicle lane" V/E clerks prepare a "dock receipt"; inspect the vehicle to insure it is running and that the brakes work; note any damage, defects or missing equipment; measure the vehicle; and then enter this information into the computer system via a computer terminal which is located in an adjacent office. The V/E clerks then move the vehicle to an area of the car lot designated by port of destination.

V/E clerks inspect and prepare receipts for heavy equipment. Customers deliver heavy equipment to a side gate at the Port of Miami terminal. On a rotational basis, all V/E clerks perform this work involving the heavy equipment. When heavy equipment is delivered, V/E clerks prepare the dock receipt, wait while an equipment operator unloads the heavy equipment onto the ground, and then inspect and measure the equipment. Upon completion of the inspection, V/E clerks return to the car lot and input the information into the computer system.

Appendix F

***2. Trailer Interchange Report Clerks*:** Eight trailer interchange report clerks (also referred to as TIR checkers), hereinafter called TIR clerks, are also supervised by stipulated supervisor Juan Carlos Perara. TIR clerks physically work in and rotate between two garage-like drive-through facilities, hereinafter called the "outbound" TIR lanes and the "inbound" TIR lanes at the Port of Miami terminal. Use of the "outbound" TIR lanes is required for trucks/equipment exiting the terminal and use of the "inbound" TIR lanes is required for trucks/equipment entering the terminal. Immediately adjacent to each TIR lane is a glass enclosed office where a computer terminal is located. One TIR clerk stands in each TIR lane to inspect trucks/equipment moving through and one TIR clerk inputs inspection data into the computer terminal located inside the office. Truckers, when exiting the terminal with empty equipment requested by an exporter customer's "pick-up" booking or with loaded equipment destined for delivery to an import customer, must drive through the "outbound" TIR lane. The trucker hands the TIR clerk a Trailer Interchange Report, hereinafter called a TIR, which the trucker has obtained from a dispatcher.

The TIR clerk takes information off the equipment and notes it on the TIR and verifies the accuracy of equipment type. To determine whether the truck/equipment is "roadworthy", the TIR clerk in the "outbound" TIR lane performs a visual inspection of the truck and equipment for obvious mechanical and structural deficiencies or damage such as broken tail or indicator lights, the condition of the tires and mud flaps, the validity of license plates, the currency of the required annual highway inspection, and any obvious tears or rips in the container. The TIR clerk records his

observations onto the pre-printed TIR form. While the TIR clerk is performing this inspection, a tireman is inflating the truck/equipment's tires to the required level. In the absence of a tireman, the TIR clerk will perform the tireman's function.

The record establishes that TIR clerks also perform minor mechanical repairs such as replace broken tail lights, replace crank handles for landing gear, affix tape over small tears, install necessary placards and remove or spray paint over unnecessary placards, and replace expired license plates. Supplies needed to perform the aforementioned repairs are maintained in a cabinet within the glass-enclosed office adjacent to the TIR lane. Repairs which exceed the skill level associated with the aforementioned tasks are performed by either a reefer mechanic, trailer mechanic, or power mechanic. TIR clerks note needed repairs onto the TIR and then use a two-way radio to request that a mechanic[13] respond to perform the needed repairs. Depending upon the type of repair needed, a reefer mechanic, trailer mechanic, or power mechanic will respond to the "outbound" TIR lanes. It appears from the record that if the repair can be made quickly, the mechanic completes the repair in the TIR lane; however, if the repair will impede the flow of advancing trucks/equipment, the mechanic will perform the repair outside of the TIR lanes. A similar inspection, this time for "seaworthiness" is performed by the TIR clerk in the "inbound" TIR lanes for truck/equipment entering the terminal. In addition to the aforementioned inspection duties and minor mechanical repair duties performed in the TIR

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13. Mechanics are assigned to the TIR lanes on a rotating basis.

lanes, when a reefer enters the TIR lanes, TIR checkers initially evaluate and inspect a reefer's refrigeration system by turning reefers on and off; looking at fuel levels, air exchange, and temperature settings; readjusting such settings as need be; and recording such information onto a Reefer Report, which is subsequently maintained by a reefer mechanic who continues to monitor the reefer equipment throughout the days while the reefer equipment remains in the terminal awaiting loading onto a vessel.

3. Equipment Control Clerks: Five equipment control clerks (also referred to as ship checkers) are separately supervised by stipulated supervisor Valentina Marrero. The equipment control clerks work out of an equipment control trailer and maintain the inventory of equipment owned or leased by the Employer through its computer system. Three of the equipment control clerks spend approximately 80 percent of their time physically standing on the "string piece"[14] next to a vessel and recording the identification numbers of cargo and equipment being loaded or unloaded onto or from the vessel, either through use of a hand-held computer and/or a clipboard with the stow plan or manifest, for inventory tracking purposes. The remainder of the three equipment control clerks' time is spent in the equipment control trailer performing related equipment inventory tasks and reconciling discrepancies in equipment location. Conversely, the remaining two equipment control clerks occasionally perform the above-described ship-side function and spend the remainder of their time in the equipment control trailer performing related equipment

14. The "string piece" is an approximately 150 foot strip of land adjacent to the water's edge where cargo is "staged" prior to being loaded onto the awaiting vessel.

inventory tasks and reconciling discrepancies in equipment location. The two equipment control clerks working in the trailer assist the equipment control clerks' performing the ship-side function by inputting their data when back-to-back vessels are being loaded and unloaded and they have insufficient time to complete their data entry into the computer system.

4. Dispatch employees (Traffic Clerks[15], Dispatchers, and Compliance Clerks): Five dispatchers and two compliance clerks are supervised by stipulated supervisors Armando Rodriquez and Ciro Cordero. The dispatchers receive computer-generated dispatch instructions from the main office, print a TIR, and give the TIR to an available independent truck driver[16] who is in the area looking for work. The dispatcher may give the TIR to a "clock driver", an hourly paid employee of the Employer, when the booking is for a customer requiring multiple location loadings or when the booking involves special "bonding" requirements. The compliance clerks work in the dispatch office and are responsible for insuring that all drivers are in compliance with highway regulations.

5. Boarding Agents: Four boarding agents are supervised by stipulated supervisor Maurice Policarpia.[17] Boarding agents

15. The record on remand does not contain testimony regarding the primary duties of the traffic clerks.

16. The Employer contracts with approximately 80 truck drivers who are independent contractors and thus not employees of the Employer. No party is seeking to include these truck drivers in any unit found appropriate.

17. The parties stipulated that Maurice Policarpia occupies the position of Operations Manager and supervises both the boarding agents and equipment operators.

coordinate a ship's arrival with the U.S. Customs, the U.S. Coast Guard, the pilot station, and the Port Authority. Boarding agents are the first employees of the Employer to board an incoming vessel. Boarding agents perform unspecified clerical aspects of preparing for the ship's arrival.

6. Inbound Coordinators: Fourteen inbound coordinators are separately supervised by stipulated supervisors Soli Chiu, Teodoro Bruns, Marta Donnelly, and Ana Chao. Inbound coordinators obtain an incoming ship's manifest (a detailed list of the cargo and containers onboard the ship) prior to the ship's arrival and enter the data from the manifest into the Employer's computer system. Simultaneously, the inbound coordinators notify customers of the expected arrival time of their cargo. Inbound coordinators coordinate with the U.S. Department of Agriculture (USDA) for its inspection of all incoming reefers. When fumigation of the reefer is required by USDA, inbound coordinators contact a dispatcher who will arrange for a clock driver to move the reefer to the fumigation company operating within the terminal. When other incoming containers are selected by U.S. Customs for inspection, the inbound coordinators coordinate by radio with the dispatchers to have the container moved by clock drivers to Custom's facility for inspection.

7. Claims Clerks: Three claims clerks are separately supervised by stipulated supervisor Ingrid Cotes. The claims clerks are located in an office next to the inbound coordinators and process all claims of damaged cargo. Claims clerks contact an equipment operator by radio to coordinate the placement of damaged cargo for inspection. A claims clerk is present when a surveyor and the customer inspect the

damaged cargo. The claims clerk photographs the damaged cargo and initiates a damage report. The claims clerk obtains backup paperwork relevant to the cargo, i.e. TIR reports, dock receipt, reefer report to evaluate the liability for the claims. Claims clerks maintain files on all drivers, ensure that each driver is properly insured to haul cargo, and ensure that master TIR agreements are on file for each driver.

8. Parts and Purchasing Clerks: Six parts and purchasing clerks are separately supervised by stipulated supervisors Carlos Rodriguez and Rudolfo Reyes. They physically work in an area adjacent to dispatch, near the TIR lanes. Parts and purchasing clerks order, receive, check and inventory parts and materials for all terminal operations, including seals for containers. They are responsible for keeping an up-to-date inventory of all parts and materials needed for terminal operations. Parts and purchasing clerks disburse parts and materials to all departments on an as needed basis. Parts and purchasing clerks operate forklifts several times each day to receive and deliver parts and drive the forklifts as much as a mile to get to the "string piece" near an awaiting vessel.

9. Stevedore Coordinators: Five stevedore coordinators are separately supervised by stipulated supervisor Fernando Delgato. Stevedore coordinators are located in a trailer in the Port of Miami terminal. Based upon computer-stored "booking" data, stevedore coordinators develop a "stow plan" depicting where cargo scheduled for an outbound vessel will be placed aboard the vessel. Stevedore coordinators work closely with the equipment operators as they move the containers, trailers, reefers, and chassis to the string piece alongside the vessel. When problems arise with locating

scheduled cargo or with placement of scheduled cargo safely on the vessel, the stevedore coordinators may contact mechanics, TIR clerks, or equipment operators for relevant information. Stevedore coordinators assist equipment control clerks in resolving discrepancies between the stow plan and cargo actually loaded onto the vessel.

REMAINING CLASSIFICATIONS

In *Seaboard Marine, Ltd.*, 327 NLRB No. 108 (February 5, 1999), the Board ordered that Case 12-RC-8176 be remanded to the Regional Director for further appropriate action to determine whether the appropriate unit must also include the Employer's maintenance employees including mechanics[18], equipment operators, clock drivers, and vehicle shuttlers. The functions of the employees in these classifications, as established in the record on remand, are as follows:

10. Power mechanics (including welders): Twelve power mechanics are separately supervised by stipulated supervisor Castor Garcia.[19] Power mechanics perform motor

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18. Mechanics include separate classifications of power mechanics (including welders); reefer mechanics; trailer mechanics; tiremen and maintenance employees.

19. In the initial hearing in Case 12-RC-8176, Castor Garcia and Raoul Arcia both were stipulated supervisors of the power mechanics (including welders). The record on remand establishes that subsequent to the initial hearing, the Employer expanded the authority of Garcia and demoted Arcia, without loss of pay, to the position of power mechanic. The record on remand reflects that supervisor Castor Garcia so informed Raoul Arcia of his demotion to power mechanic.

and engine maintenance on the Employer's equipment used to move cargo, (i.e. "mules", forklifts, and toploaders) and on some cargo, such as used busses/trucks being shipped overseas to make them self-propelled. Unlike reefer and trailer mechanics, power mechanics are not provided the use of step vans out of which to work. The record does not disclose the principal location within the Port of Miami terminal where power mechanics perform their work. Stevedore coordinators request via radio the assistance of power mechanics to load self-propelled heavy equipment onto a vessel. TIR clerks request via radio the assistance of power mechanics to repair equipment in the TIR lanes when necessary. To repair certain types of leaks on equipment, vehicle and equipment receiving clerks or equipment operators will request via radio the assistance of power mechanics. The record establishes that the Employer does not require any specific education, certification or formal training for power mechanics.

11. Reefer mechanics: Twenty-two reefer mechanics are separately supervised by stipulated supervisors Steven Tzoumas, and Juan Urbina.[20] Reefer mechanics inspect, maintain and repair refrigerated trailers and containers,

20. At the initial hearing in Case 12-RC-8176, Clyde Wingate, Steven Tzoumas, and Juan Urbina each were stipulated as supervisors of the reefer mechanics. At the hearing on remand, testimony referred to Wingate, Tzoumas and Urbina first as supervisors and then as "headers". Later in the hearing, the parties stipulated that Steven Tzoumas and Juan Urbina were statutory supervisors. Whether intentional or inadvertent, the record does not address the duties or supervisory status of Clyde Wingate. Inasmuch as the record is insufficient to establish the primary duties of Clyde Wingate, he will be permitted to vote subject to challenge.

collectively called reefers. Reefer mechanics drive step vans which contain needed tools and equipment to perform their repairs throughout the Port of Miami terminal. Reefer mechanics receive from inbound coordinators a list of reefers, which have been off-loaded from a vessel and have passed USDA inspection. Reefer mechanics monitor the aforementioned reefers until they are delivered by clock drivers or independent contractors to the appropriate customer. Reefer mechanics monitor refrigerated cargo awaiting shipment every six hours to insure that the required refrigeration level is maintained so as to avoid spoilage and record their observations onto the Reefer Report, which was initially generated by the TIR clerk when the refrigerated cargo first entered the TIR lanes. Reefer mechanics "quite frequently" respond to radio calls from TIR clerks to repair reefers in need of repair beyond that which the TIR clerks can perform. Such repairs are performed in the TIR lane or the reefer is driven out of the TIR lane by the clock driver or independent driver for repair. The record establishes that the Employer does not require any specific education, certification or formal training requirements for reefer mechanics.

*12. **Trailer mechanics:*** Seventeen trailer mechanics are separately supervised by stipulated supervisor Juan Rodriguez. Trailer mechanics inspect and repair containers, reefers, chassis or trailers for general structural or mechanical problems. Trailer mechanics work throughout the terminal out of step vans which contain needed tools and equipment to perform necessary repairs. Trailer mechanics receive from inbound coordinators a list of containers or trailers that are to be transported by truck over long distances. Trailer

mechanics perform over-the-road inspections on such equipment. Trailer mechanics inspect empty containers coming off a vessel to determine if repairs are needed. Similar to power mechanics and reefer mechanics, trailer mechanics "quite frequently" respond to radio calls from TIR clerks to repair equipment in need of repair beyond that which the TIR clerks can perform. Similarly, trailer mechanics respond to radio calls from vehicle and equipment receiving clerks to repair equipment received in the vehicle receiving lot which is in need of repair beyond that which the vehicle and equipment receiving clerk can perform. The record establishes that the Employer does not require any specific education, certification or formal training requirements for trailer mechanics.

13. Tiremen: Three tiremen are separately supervised by stipulated supervisor Manuel Alvarez. While TIR clerks are inspecting the truck and trailer in the "outbound" TIR lane, one of the tiremen works within that same TIR lane inserting equalized pressure into the truck and trailer tires prior to the rig traveling on public roads. The remaining two tiremen perform tire repair within the tire repair building adjacent to the "inbound" TIR lane. The record establishes that the Employer does not require any specific education, certification or formal training requirements for tiremen.

14. Maintenance Employees: Two maintenance employees perform general physical maintenance work at the Port of Miami terminal, including sweeping out empty containers, emptying trash in the terminal yard area and in the TIR lanes, installing exhaust fans in the TIR lanes, repairing a bathroom floor, installing an air conditioning unit

in an office trailer, banging out dents in containers, and patching minor holes in containers. The record does not establish who directly supervises the two maintenance employees; rather, it appears from the record that they receive direction from various classifications when general physical maintenance work is needed in any area of the terminal. The record establishes that the Employer does not require any specific education, certification or formal training requirements for the maintenance employees.

15. Equipment operators (including headers): Fifty-five equipment operators are supervised by stipulated supervisors Albert Smalls, Jr., Yard Foreman, and Maurice Policarpia, Operations Manager. Four ship teams of five equipment operators each, one of whom on each team is a "header",[21] stage equipment that is loaded or unloaded off

21. At the initial hearing, Petitioner 1922 and the Employer stipulated that Joseph Cruz, Gerardo Palomo, Albert Smalls, Jr., Manuel Florian and Richard Deroxtro responsibly directed employees in a manner which was not of a merely routine or clerical nature but which requires the use of independent judgment. In the Decision and Direction of Election in Case 12-RC-8176 the Acting Regional Director found the five aforementioned individuals to be supervisors within the meaning of Section 2(11) of the Act and excluded them from the unit found appropriate therein. At the hearing on remand, the parties stipulated that Joseph Cruz is now the Yard Manager at Port Everglades facility and that Albert Smalls, Jr. is now the Yard Foreman at the Port of Miami terminal and that both possess Section 2(11) authority. However, the Employer contends that the remaining three employees (Gerardo Palomo, Manuel Florian, and Dick Deroxtro) are no longer "supervisors" but rather are "headers" who, along with three new "headers" (Roberto Tapanes, Richard Guilamo, (Cont'd)

vessels. A "yard team" and "Dick's crew" comprised of 14 equipment operators and 6 equipment operators, respectively, one of whom on each team/crew is a "header", move equipment and organize equipment within the yard. A "reefer team" comprised of three equipment operators, with no "header", moves reefers. The teams/crew are assigned to staggered shifts. "Headers" obtain a copy of the stow plan for their teams' assigned vessel from the stevedore coordinator and distribute assignments to the equipment operators so that cargo will be staged in the proper sequence. Equipment operators also unload heavy equipment delivered by customers to the terminal's back gate and odd lot[22]. Equipment operators

(Cont'd)

and Jesus Peraza) possess no supervisory indicia and should be included in the unit. Although the record establishes that the "headers" do not discipline their team/crew members without approval of the Director of Operations, who conducts an independent investigation; do not schedule teamlerew members; do not schedule vacations; do not make changes to team/crew member schedules; and do not switch team members. The record does not establish to what degree the "headers" use independent judgment in otherwise directing employees on their team/crew. Further, the record establishes that the "headers" sign employee evaluations and were never told that their job responsibilities had changed. Finally, no "header" suffered a loss of pay because of the alleged change in duties. It appears from the record that the only tangible change has been that a patch on the "headers" uniform shirt now reads "header" rather than "supervisor". Thus, inasmuch as the record fails to establish sufficient facts as to the degree of independent judgment used by the "headers" in carrying out their duties, "headers" will be permitted to vote subject to challenge.

22. The "odd lot" is a separate location at the Port of Miami terminal where equipment which is too large to enter the TIR lane will be received and inspected by a TIR clerk.

use forklifts[23], top-loaders or cranes[24] to remove a container from the chassis or use a "mule" to position trailers, chassis or reefers within the terminal. The director of operations testified that equipment operators, like clock drivers and vehicle shuttlers, must possess a CDL (commercial driving license), but no other education, certification or formal training is required.

The Petitioners presented one witness at the hearing on remand, equipment operator Luis Vilarino, who testified that when he was hired as an equipment operator in December 1996 a CDL "Class A"[25] license with air brakes, two years of experience in driving heavy equipment, and an on-site driving test using a "mule" were required by the Employer. Vilarino further testified that he had viewed a notice posting as recently as the day before the hearing on remand which reflected the Employer's continuing requirements that

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23. Forklifts used by the Employer's equipment operators are up to 14 feet high, 20 feet long, and 15 feet wide and carry up to 66,000 pounds of weight.

24. Top-loaders or cranes used by the Employer's equipment operators are up to 80 feet high and 20 feet wide and can pick up containers as long as 45 feet and wide as 8 feet and weighing as much as 90,000 pounds.

25. A CDL "Class A" license is the highest classification of commercial driving license which allows the operation of a combination of tractor/trailer with air brakes. A CDL "Class B" allows the driving of straight trucks either with air brakes or hydraulics. A CDL "Class C" allows the driving of a smaller truck. A CDL "Class D" allows the driving of commercial vans that transport cargo over a certain weight.

equipment operators possess a CDL "Class A" license with air brakes plus two years of experience in operating heavy equipment. Vilarino further testified that equipment operators do not come in daily contact with employees except for other equipment operators. Specifically, Vilarino testified that equipment operators do not come in direct contact with dispatchers, TIR clerks, vehicle and equipment receiving clerks, clock drivers, stevedore coordinators, equipment control clerks, boarding agents, mechanics or inbound coordinators. Vilarino testified that any communication which equipment operators had with other classifications was received through the "header" of the equipment operator's team/crew.

The Employer presented a trailer mechanic, a dispatcher, and a vehicle and equipment receiving clerk at the hearing on remand to rebut Vilarino's testimony. The trailer mechanic testified that (1) he frequently contacted equipment operators directly to have equipment moved; (2) equipment operators also contacted him directly by radio to ask whether he had available equipment to move; and (3) he works with an equipment operator when mounting chassis "fourteen to fifteen" times a day and communicates with the equipment operator directly by radio. The dispatcher testified that he contacts equipment operators (including non-"headers") via radio two to three times an hour every day to locate equipment or transport equipment. Finally, the vehicle and equipment receiving clerk testified that he calls equipment operators via radio multiple times per day to have equipment moved. The vehicle and equipment receiving clerk testified that he has called Vilarino directly and Vilarino has called him directly to have equipment moved. The Employer did not

address on rebuttal Vilarino's testimony that the Employer had posted a document reflecting that equipment operators must have "Class A" licenses and two years of experience.

16. Clock Drivers: Five clock drivers are employed at the Employer's Port of Miami terminal and are supervised by stipulated supervisors Armando Rodriquez and Ciro Cordero, both of whom also supervise the dispatch employees. Clock drivers are contacted via radio by dispatchers to coordinate delivery of equipment to customers who need loading at several different locations. Clock drivers pick up the requested equipment by truck from the designated area of the Port of Miami terminal either with the assistance of equipment operators or on their own accord when equipment operators are unavailable, proceed to the "outbound" TIR lanes for inspection, drive to the customer's location, await the filling of the load, generate a TIR for the next load, and when completed, return the loaded equipment back to the terminal for inspection in the "inbound" TIR lanes. However, frequently, clock drivers will perform both the "outbound" and "inbound" TIR inspections themselves outside the TIR lanes and turn in completed TIRs to the TIR checkers for further processing. Upon completion of the "inbound" inspection, clock drivers drive the cargo to the designated location at the terminal where either an equipment operator off-loads the cargo or the clock drivers off-load the cargo themselves. When mounting the equipment or dismounting the cargo themselves, the clock drivers will use the same equipment as the equipment operators, including forklifts, cranes (top-loaders) and special trucks (mules). Clock drivers utilize the aforementioned equipment on an estimated weekly basis. Director of operations Gonzalez

testified that all clock drivers were prior equipment operators for the Employer. Clock drivers frequently communicate with equipment operators to obtain the location of equipment to be mounted and/or the designated location within the terminal where the cargo is to be dismounted. A clock driver will be temporarily assigned to the Port Everglades facility to function as an equipment operator on an approximate weekly basis and will fill in for equipment operators at the Port Everglades facility for vacation and sick leave.

*17. **Vehicle Shuttlers:*** Six vehicle shuttlers are separately supervised by stipulated supervisor Thomas Hernandez. Vehicle shuttlers drive the vehicles from the vehicle receiving lot across the street to the "string piece" for loading onto a vessel. When a vehicle is inoperable, the vehicle shuttler will use a tow truck to tow the vehicle to the "string piece". As part of the staging process, vehicle shuttlers may "stuff" the vehicle into a container to be loaded onto a vessel and secure it with binders. When vehicles are "stuffed" into containers, the vehicle shuttler radios ahead to an equipment operator to have the container "grounded" so the vehicle shuttler can drive the vehicle into the container. When a vehicle is to be mounted onto a flatbed, the vehicle shuttler radios ahead to an equipment operator to have the flatbed at the "string piece". If an equipment operator is unavailable to lift the vehicle onto the flatbed, the vehicle shuttler will operate a forklift to "ground" the vehicle onto the flatbed. When vehicle shuttlers have completed their shuttling duties, the shuttlers perform the same inspection duties as are performed by vehicle and equipment receiving clerks. This situation occurs two to three times weekly. Vehicle and equipment receiving clerks, TIR clerks and equipment

operators frequently assist vehicle shuttlers in driving vehicles from the vehicle receiving lot to the "string piece" when the workload necessitates such assistance. Vehicle shuttlers may assist equipment operators "in a learning process" on weekends and during peak need. Vehicle shuttlers must possess a CDL license but no other education, certification or formal training is required.

THE 36TH STREET YARD

At its 36th Street Yard, the Employer employs only 5 of the aforementioned 17 classifications for a total of approximately 38 employees. The five classifications assigned to the 36th Street Yard are: trailer mechanics, power mechanics (including a welder), equipment operators (one of whom performs both equipment operator duties and clock driver duties), a TIR clerk, and two dispatchers. The primary function of the 36th Street Yard is to store most empty trailers, store overflow empty containers which are in excess of the immediate need at the terminal, and to perform necessary repairs to empty trailers and containers. No inbound or outbound cargo enters the 36th Street Yard. The record reflects that the duties of each classification assigned to the 36th Street Yard are similar to the duties for that classification at the Port of Miami terminal except for those of the TIR clerk. Thus, at the 36th Street Yard, the TIR clerk completes only the top portion of the TIR and does not perform a visual inspection or record data regarding the mechanical or structural condition of the equipment. The TIR clerk at the 36th Street Yard is temporarily assigned to work as a TIR clerk at the Port of Miami terminal to cover for absences approximately once a month.

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THE PORT EVERGLADES FACILITY

The Employer expanded its operation to include the Port Everglades facility in October 1998, approximately ten months after the initial hearing in Case 12-RC-7186. The Employer's Port Everglades facility is located approximately 25 miles from its Port of Miami terminal and is staffed with two equipment operators, one checker[26] and two stipulated supervisors, specifically Marco Franco, Terminal Manager, and Jesus Cruz, Yard Manager.

UNIFORM WORKING CONDITIONS/POLICIES/ PRACTICES/WAGE SCALE/BENEFITS

The Employer's personnel policies and practices for employee complaints, absenteeism, leave of absence, tardiness, sick leave, code of conduct, dress codes, drug and alcohol use, discipline, evaluations, wage increases, and benefits are uniformly applied to all employees. Labor relations is centralized in a Human Resources Department located at the main office. Work and safety rules are applicable to all employees. All employees at the Port of Miami terminal punch one of two timeclocks. All employees, except for temporary employees, are paid biweekly by the Employer through direct deposit.[27] Beginning wage rates for

26. The record on remand is unclear as to whether the checker at the Port Everglades facility is a trailer interchange clerk or a vehicle and receiving clerk.

27. The record on remand establishes that the Employer contracts with a temporary employment agency to provide approximately six vehicle shuttlers and an undisclosed number of (Cont'd)

all classifications range from $9.00 to $15.00 per hour, wage caps for all classifications range from $10.00 to $17.00 per hour. The Employer provides uniforms to employees who work outside of the trailer offices. Blue shirts (pullover or button down) with blue pants are provided employees; supervisors wear white shirts with blue pants. Employer sponsored activities are open to all employees and one employee newsletter is distributed to all employees.

PERMANENT TRANSFERS

At the initial hearing in Case 12-RC-8176 Human Resource Director Dumkley testified that 91 employees have permanently transferred between classifications. Documentation received in evidence to support her testimony establishes that since 1983 approximately 91 employees transferred between classifications. Of these 91 employees who transferred, approximately 20 permanent transfers were between classifications remanded by the Board and equipment operator positions; approximately 10 permanent transfers were amongst the classifications in the "smallest appropriate unit" found by the Board; approximately 6 permanent transfers were between classifications in the "smallest appropriate unit" found by the Board and remanded positions other than equipment operators; and approximately 3 permanent transfers were between classifications in the "smallest appropriate unit" found by the Board and equipment

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(Cont'd)
employees in other unidentified classifications to work at the Employer's Port of Miami terminal. The parties stipulated that all temporary employees are to be excluded from any unit found appropriate herein.

operators. In addition to the above-described permanent transfers, at the hearing on remand, documentation was entered into evidence establishing that 14 current employees (11 of whom were not included in the above-described employee permanent transfers) had permanently transferred either between classifications in the "smallest appropriate unit" found by the Board and those remanded positions, or between remanded positions. Six (6) of the permanent transfers occurred within the past year.

ANALYSIS AND CONCLUSION

Section 9(b) of the Act states that, "the Board shall decide in each case whether, to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purpose of collective bargaining shall be the employer unit, craft unit, or subdivision thereof"

The statute does not require that a unit for bargaining be the only appropriate unit, or the ultimate unit, or the most appropriate unit. Rather, the Act requires only that the unit be "appropriate," that is, appropriate to insure to employees in each case "the fullest freedom in exercising the rights guaranteed by this Act." *Morand Bros. Beverage Co.*, 91 NLRB 409 (1950), enfd. 190 F.2d 576 (7th Cir. 1951); and *Dezcon, Inc.*, 295 NLRB 109 (1989). A union is, therefore, not required to seek representation in the most comprehensive grouping of employees unless "an appropriate unit compatible with that requested does not exist." *P. Ballantine & Sons*, 141 NLRB 1103 (1963); *Bamberger's Paramus*, 151 NLRB 748, 751 (1965); and *Purity Food Stores*, 160 NLRB 651 (1966). Moreover, it is well

established that there is more than one way in which employees of a given employer may appropriately be grouped for purposes of collective bargaining. *General Instrument Corp. v. NLRB*, 319 F.2d 420, 422-423 (4th Cir. 1963), cert. denied, 375 U.S. 966 (1964); and *Mountain Telephone Co. v. NLRB*, 310 F.2d 478, 480 (10th Cir. 1962).

In making unit determinations, the Board is required to strike a balance between the competing interests of the union, employer, employees and the public. The petitioner's desire as to the unit is a relevant consideration, although not dispositive. *The Lundy Packing Company, Inc.*, 314 NLRB 1042 (1994); *Airco, Inc.*, 273 NLRB 348 (1984). While the Act does not lay down any specific standards for making unit determinations, the Board has developed a number of criteria to be applied in such cases. Foremost is the principle that mutuality of interest in wages, hours, and working conditions is the prime determinant of whether a given group of employees constitutes an appropriate unit. *Continental Baking Co.*, 92 NLRB 777, 782 (1952). Thus, the key question is whether the employees have a sufficient community of interest to constitute an appropriate unit. *Tidewater Oil Co. v. NLRB*, 358 F.2d 363, 366 (2d Cir. 1964), cert. denied, 380 U.S. 910 (1965). As stated by the Board in *Continental Baking*:

> In deciding whether the requisite mutuality exists, the Board looks to such factors as the duties, skills, and working conditions of the employees involved, and especially to any existing bargaining history. [92 NLRB at 782-783.]

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The community-of-interest test also considers factors such as the degree of functional integration, *Atlanta Hilton & Towers*, 273 NLRB 87 (1984); common supervision, *Associated Milk Producers*, 250 NLRB1407 (1970); employee skills and functions, *Phoenician*, 308 NLRB 826 (1992); interchangeability and contact among employees, *Associated Milk Producers, supra*; and general working conditions and fringe benefits, *Allied Gear & Machine Co.*, 250 NLRB 679 (1950).

With respect to the establishment of a craft or department unit, the general rule is:

> Where no bargaining history on a more comprehensive basis exists, a craft or traditional department group having a separate identity of functions, skills, and supervision, exercising craft skills or having a craft nucleus, is generally appropriate. See, for example, *E. I. Du Pont & Co.*, 162 NLRB 413 (1966). See also *E. I. Du Pont & Co.*, 192 NLRB 1019 (1971).

In *Burns & Roe Services Corp.*, 313 NLRB 1307,1308 (1994), the Board described the test:

> In determining whether a petitioned-for group of employees constitutes a separate craft unit, the Board looks at whether the petitioned-for employees participate in a formal training or apprenticeship program; whether the work is functionally integrated with the work of the excluded employees; whether the duties of the

petitioned-for employees overlap with the duties of the excluded employees; whether the employer assigns work according to need rather than on craft or jurisdictional lines; and whether the petitioned-for employees share common interests with other employees, including wages, benefits and cross-training.

Unless a particular departmental grouping of employees is functionally distinct so as to have a separate community of interest, the Board will find a wall-to-wall unit to be the appropriate unit. The degree of functional integration in the employer's operations is given considerable weight in the Board's unit determination. *J. Ray McDermott and Co. Inc.*, 240 NLRB 864 (1970); *Keyser Aluminum and Chemical Corp.*, 177 NLRB 682 (1969); *Minnesota Mining and Manufacturing Co.*, 129 NLRB 789 (1960).

Applying these principles to the instant consolidated cases, while I recognize that the equipment operators petitioned for by Petitioner Local 1416 in Case 12-RC-8325 have certain distinct functions and interests that are not common to all other employees, I find that the equipment operators do not constitute a distinct and homogeneous group (or true craft unit in the traditional sense) and are not a functionally distinct department of the Employer. In reaching that conclusion, all relevant factors in the record as a whole were considered. Specifically, the record establishes that equipment operators have frequent and varied work contacts with dispatchers, stevedore coordinators, TIR clerks, clock drivers, vehicle and equipment receiving clerks, and mechanics; that equipment operators and clock drivers

similarly mount and dismount cargo; that vehicle shuttlers stage vehicles onto the "string piece" similar to the equipment operators' staging of equipment onto the "string piece"; that mechanics, like equipment operators, operate forklifts, toploaders and "mules"; that equipment operators, clock drivers, and vehicle shuttlers similarly are required to possess a CDL; that even if the equipment operators must possess a CDL "Class A", clock drivers in all likelihood also possess a CDL "Class A" since the record establishes that all clock drivers previously had been equipment operators for the Employer, and that equipment operators share common benefits and conditions of employment similar to all other employees. See *Walker Boat Yard, Inc.*, 273 NLRB 309 (1984); *Brown and Root, Inc.*, 258 NLRB 1002 (1981); *Beecham Products, Inc.*, 251 NLRB 731 (1980); and *U.S. Plywood-Champion Papers*, 174 NLRB 292 (1969). See also, *Metropolitan Opera Association, Inc.*, 327 NLRB No. 136 (February 26, 1999).

In its decision on review, *Seaboard Marine, Ltd.*, 327 NLRB No. 108, the Board has already found there is a high degree of functional integration in the Employer's operation and that the work performed by the trailer exchange clerks, the vehicle and equipment receiving clerks, and equipment control clerks is directly related to and integrated with the work of the majority, if not all, of the Employer's remaining employees. The Board further found that, at a minimum, the appropriate unit must also include dispatch employees (traffic clerks, dispatchers and driver compliance employees), boarding agents, inbound coordinators, claims clerks, parts/ purchasing clerks, and stevedore coordinators. The Board stated that the record then before it was not sufficient to

determine whether the appropriate unit must also include the Employer's maintenance employees, including mechanics, equipment operators, clock drivers and vehicle shuttlers.

The Petitioners at the hearing on remand expressed an interest in proceeding to an election in any broader unit found appropriate. Thus, I must determine whether the "smallest appropriate unit" found by the Board also must include the following eight classifications — power mechanics (including welders), reefer mechanics, trailer mechanics, tiremen, maintenance, equipment operators, clock drivers, and vehicle shuttlers.

Power Mechanics (including welders): These twelve employees perform motor and engine maintenance on all equipment used by equipment operators, clock drivers, and vehicle shuttlers to move cargo, as well as on some of the cargo. In performing such maintenance work, power mechanics come in contact with stevedore coordinators, TIR clerks, equipment operators, clock drivers, and vehicle shuttlers. No specific education, certification or formal training is required. Thus, insofar as these employees maintain and repair the equipment which is directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the power mechanics (including welders) shall be included in the unit.[28]

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28. As discussed with respect to equipment operators, the record fails to reflect that the power mechanics or other mechanics constitute a distinct and homogeneous group (or a true craft unit in the traditional sense) or a functionally distinct department of the Employer.

Appendix F

Reefer Mechanics: These twenty-two employees inspect, maintain and repair refrigerated trailers and containers. collectively called reefers. In performing such maintenance work, reefer mechanics come in contact with TIR clerks, inbound coordinators, and equipment operators, two of which specifically are assigned to work directly with the reefer mechanics. No specific. education, certification or formal training is required. Thus, insofar as these employees maintain and repair the equipment which is directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the reefer mechanics shall be included in the unit.

Trailer Mechanics: These seventeen employees inspect and repair containers, reefers, chassis or trailers for general structural or mechanical problems. In performing such maintenance work, trailer mechanics come in contact with inbound coordinators, TIR clerks, and vehicle and equipment receiving clerks. No specific education, certification or formal training is required. Thus, insofar as these employees maintain and repair the equipment which is directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the trailer mechanics shall be included in the unit.

Tiremen: One of the three tiremen work within the same TIR lane with TIR clerks while the tireman inserts equalized pressure into the truck and trailer tires; the other two tiremen perform tire repair in a building adjacent to the "inbound" TIR lane. In performing such maintenance work, tiremen

come in contact with at least TIR clerks. No specific education, certification or formal training is required. Thus, insofar as these employees maintain and repair the tires on equipment which is directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the tiremen shall be included in the unit.

Maintenance employees: These two employees perform general physical maintenance work at the terminal, including sweeping out empty containers, emptying trash throughout the terminal, installing exhaust fans, repairing floors, and banging out dents and patching minor holes in containers. As the aforementioned duties occur throughout the terminal, maintenance employees come in contact with all classifications of employees, specifically the TIR clerks, trailer mechanics, and power mechanics. No specific education, certification or formal training is required. Thus, insofar as these employees maintain and repair the equipment which is directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the maintenance employees shall be included in the unit.

Equipment Operators: These fifty-five employees stage equipment that is loaded or unloaded off vessels and move and organize equipment within the terminal. In performing these duties, equipment operators come in contact with power mechanics, trailer mechanics, reefer mechanics, clock drivers, vehicle shuttlers, stevedore coordinators, inbound coordinators, TIR clerks, vehicle and equipment receiving

clerks. Equipment operators, like clock drivers and vehicle shuttlers, must possess a CDL but no other education, certification or formal training is required. Thus, insofar as these employees are directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees and my finding above that they do not constitute a separate appropriate unit, the equipment operators shall be included in the unit.

Clock Drivers: These five employees deliver equipment to customers who need loading at several different locations and then return with the loaded equipment to the terminal for shipment. Rather than seeking the assistance of equipment operators, clock drivers frequently mount and dismount their own equipment. Rather than having TIR clerks perform TIR inspections for them, clock drivers frequently perform the TIR. inspections themselves. In performing their job functions, clock drivers come in contact with dispatchers, TIR clerks and equipment operators. Clock drivers, like equipment operators and vehicle shuttlers, must possess a CDL, but no other education, certification or formal training is required. Thus, insofar as these employees are directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the clock drivers shall be included in the unit.

Vehicle Shuttlers: These six employees drive vehicles from the vehicle receiving lot across the street to the "string piece" for loading onto a vessel. In performing these duties, the vehicle shuttlers come in contact with vehicle and

equipment receiving clerks, TIR clerks, and equipment operators. Vehicle shuttlers, like equipment operators and clock drivers, must possess a CDL, but no other education, certification or formal training is required. Thus, insofar as these employees are directly involved in the moving of cargo, they form an integral part of the Employer's operations. Based upon the substantial integration and aforementioned contacts with other employees, the vehicle shuttlers shall be included in the unit.

In summary, the record as a whole establishes that the Employer's operations and functions are such as to warrant a finding that only an overall unit is appropriate. *Birdsall, Inc.*, 268 NLRB 186 (1983); *Walker Boat Yard, Inc., supra.*

In view of the foregoing and the record as a whole, I find the following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time trailer interchange clerks, vehicle and equipment receiving clerks, equipment control clerks, dispatch employees (traffic clerks, dispatchers, and compliance clerks), boarding agents, inbound coordinators, claims clerks, parts and purchasing clerks, stevedore coordinators, power mechanics (including welders), reefer mechanics, trailer mechanics, tiremen, maintenance employees, equipment operators, clock drivers, and vehicle shuttlers, employed by the Employer's facilities located at 36th Street and at 1306 Port Boulevard

in Miami, Florida, and at 3800 SE Macintosh Road, Hollywood, Florida, but excluding all temporary employees, office clerical employees, guards and supervisors[29] as defined in the Act.[30]

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29. The parties stipulated, and I find, that the following assistant foremen, foremen, and supervisors responsibly direct employees in a manner which is not of a merely routine or clerical nature but which requires the use of independent judgment and are thus excluded from the unit as supervisors within the meaning of Section 2(11) of the Act: Supervisor of the vehicle and equipment receiving clerks and the trailer interchange clerks — Juan Carlos Perara; Supervisor of equipment control clerks — Valentina Marrero; Supervisors of dispatch employees (traffic clerks, dispatchers, and compliance clerks) and clock drivers — Armando Rodriquez and Ciro Cordero; Supervisor of boarding agents and equipment operators — Maurice Policarpia; Supervisors of inbound coordinators — Soli Chiu, Teodoro Bruns, Marta Donnelly, and Ana Chao; Supervisor of claims clerks - Ingrid Cotes; Supervisors of parts and purchasing clerks — Carlos Rodriguez and Rudolfo Reyes; Supervisor of stevedore coordinators — Fernando Delgato; Supervisor of power mechanics (including welders) — Castor Garcia; Supervisors of reefer mechanics — Steven Tzoumas and Juan Urbina; Supervisor of trailer mechanics — Juan Rodriguez; Supervisor of tiremen — Manuel Alvarez; Supervisors of equipment operators — Albert Smalls, Jr., and Maurice Policarpia; Supervisor of vehicle shuttlers — Thomas Hernandez, Supervisors of employees assigned to the Port Everglades facility — Marco Franco (terminal manager) and Jesus Cruz (yard manager); and Supervisors of employees assigned to the 36th Yard — Juan "Pepe" Gonzales, Miguel Hiedra, and Alexis Jimenez. As noted earlier herein, the "headers" working with the equipment operators and Clyde Wingate may vote subject to challenge.

30. As the unit found appropriate herein is, in view of my findings herein, larger than each of the units initially sought by the

(Cont'd)

Appendix F

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation or temporarily laid off. Also eligible are employees engaged in an economic strike which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date and employees engaged in an economic strike which commenced more than

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Petitioners, and as it has been administratively determined that neither Petitioner has an adequate showing of interest to support its petition, each Petitioner must submit an adequate showing of interest within 14 days from the date of this Supplemental Decision and Direction of Election in Case 12-RC-8176 and Decision and Direction of Election in Case 12-RC-8325, absent which, if the Petitioner does not withdraw its petition, the petition will be dismissed. Furthermore, if an adequate showing of interest is presented by one Petitioner only, the other Petitioner should notify the undersigned within the same 14 days whether or not it wishes to remain on the ballot as an intervenor in that case.

12 months before the election date and who have been permanently replaced.[31] Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by International Longshoremen's Association, Local 1922, affiliated with International Longshoremen's Association, AFL-CIO, or by International Longshoremen's Association, Local 1416, affiliated with International Longshoremen's Association, AFL-CIO, or neither.[32]

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31. In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven (7) days of the date of this Supplemental Decision and Direction of Election in Case 12-RC-8176 and Decision and Direction of Election in Case 12-RC-8325, three (3) copies of an alphabetized election eligibility list, containing the full names and addresses of all eligible voters in the unit found appropriate, shall be filed by the Employer with the Regional Director for Region 12. *North Macon Health Care Facility*, 315 NLRB 359 (1994). This list may initially be used by the Regional Director to assist in determining an adequate showing of interest. The Regional Director shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office on or before April 2, 1999. No extension of time to file this list may be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the filing of such list.

32. Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20570-0001. This request must be received by the Board in Washington by April 9, 1999.

Appendix F

DATED at Tampa, Florida, this 26th day of March, 1999.

s/ Rochelle Kentov
Rochelle Kentov, Regional Director
National Labor Relations Board, Region 12
201 E. Kennedy Blvd., Suite 530
Tampa, FL 33602-5824

APPENDIX G — RELEVANT STATUTORY PROVISIONS

29 U.S.C. § 151

§ 151. Findings and declaration of policy

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the

stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of

representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 157

§ 157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 159

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such

purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: Provided, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination,

unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

* * *

(d) Petition for enforcement or review; transcript

Whenever an order of the Board made pursuant to section 160(c) of this title is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsection (e) or (f) of section 160 of this title, and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made

and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

* * *

29 C.F.R. § 101.21

§ 101.21 Procedure after hearing.

(a) Pursuant to section 3(b) of the Act, the Board has delegated to its Regional Directors its powers under section 9 of the Act to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof. These powers include the issuance of such decisions, orders, rulings, directions, and certifications as are necessary to process any representation or deauthorization petition. Thus, by way of illustration and not of limitation, the Regional Director may dispose of petitions by administrative dismissal or by decision after formal hearing; pass upon rulings made at hearings and requests for extensions of time for filing of briefs; rule on objections to elections and challenged ballots in connection with elections Directed by the Regional Director or the Board, after administrative investigation or formal hearing; rule on motions to amend or rescind any certification issued after the effective date of the delegation; and entertain

motions for oral argument. The Regional Director may at any time transfer the case to the Board for decision, but until such action is taken, it will be presumed that the Regional Director will decide the case. In the event the Regional Director decides the issues in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.

* * * *

29 C.F.R. § 102.67

§ 102.67 Proceedings before the regional director; further hearing; briefs; action by the regional director; appeals from action by the regional director; statement in opposition to appeal; transfer of case to Board; proceedings before the Board; Board action.

* * *

(b) A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: Provided, however, That within 14 days after service thereof any party may file a request for review with the Board in Washington, D.C. The regional director shall schedule and conduct any election directed by the decision notwithstanding that a request for review has been filed with or granted by the Board. The filing of such a request shall not, unless

otherwise ordered by the Board, operate as a stay of the election or any action taken or directed by the regional director: Provided, however, That if a pending request for review has not been ruled upon or has been granted ballots whose validity might be affected by the final Board decision shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such decision.

(c) The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

Appendix G

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

* * * *

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No. 01-1569

In the Supreme Court of the United States

INTERNATIONAL LONGSHOREMAN'S ASSOCIATION, LOCAL 1922, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the district court lacked subject-matter jurisdiction over petitioner's lawsuit against the National Labor Relations Board, which arose out of a Board representation proceeding.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-2a) is unreported, but the judgment is noted at 31 Fed. Appx. 930. The opinion of the district court (Pet. App. 3a-11a) is reported at 144 Lab. Cas. (CCH) ¶ 11,120. The decision of the National Labor Relations Board in the representation proceeding (Pet. App. 36a-40a) is reported at 327 N.L.R.B. 556. The decision of the Board's Acting Regional Director (Pet. App. 12a-34a) and the supplemental decision of the Board's Regional Director (Pet. App. 41a-82a) in the representation proceeding are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 2002. The petition for a writ of certiorari

was filed on April 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On November 25, 1997, petitioner filed a representation petition with Region 12 of the National Labor Relations Board (Board). Petitioner sought to represent a bargaining unit consisting of 17 workers employed by Seaboard Marine, Ltd. (Seaboard), which transports cargo at the Port of Miami, Florida. Pet. App. 4a, 14a-15a. Petitioner sought to represent employees in only three of Seaboard's numerous job classifications—trailer interchange clerks, vehicle and equipment receiving clerks, and equipment control clerks. *Id.* at 4a, 13a-14a. Seaboard, however, contended that the only appropriate bargaining unit would be a "wall-to-wall" unit comprising approximately 198 workers in 15 job classifications. *Id.* at 4a, 14a, 16a.

After a hearing, the Board's Acting Regional Director (ARD) found that the 17 employees in the unit proposed by petitioner shared a community of interest sufficient to make that unit appropriate for purposes of collective bargaining under Section 9(b) of the National Labor Relations Act (Act), 29 U.S.C. 159(b), which provides, in pertinent part, that "[t]he Board shall decide in each case whether * * * the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Pet. App. 4a, 29a-30a, 32a. The ARD directed that an election be held among the employees in that unit. *Id.* at 33a-34a.

Seaboard filed with the Board a timely request for review of the ARD's decision, as permitted by the Board's procedural rules. Pet. App. 4a, 34a n.18, 37a. On February 4, 1998, the Board granted Seaboard's

request for review. *Id.* at 4a, 35a. The Board explained that it was granting Seaboard's request because the ARD's decision "raises substantial issues warranting review." *Id.* at 35a. See *id.* at 4a, 9a n.2; 29 C.F.R. 102.67(c)(1)(ii) (Board may grant a request for review where "a substantial question of law or policy is raised because of * * * a departure from, officially reported Board precedent"). The next day, February 5, 1998, the Board conducted an election in the smaller unit deemed appropriate by the ARD and impounded the ballots. Pet. App. 42a.

On February 5, 1999, the Board issued a decision addressing the merits of Seaboard's request for review. Pet. App. 36a-40a. The Board found that "the unit in which the [ARD] has directed an election is not appropriate" for collective bargaining. *Id.* at 37a. The Board noted its "well established" policy of "not approv[ing] fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Ibid.* Applying that policy, the Board concluded that "the petitioned-for employees do not share a sufficiently distinct community of interest from other employees to warrant a separate unit and, therefore, that the unit grouping sought by [petitioner] is an arbitrary one." *Ibid.* The Board therefore reversed the ARD's decision, vacated the February 5, 1998 election, and remanded the proceeding for "further appropriate action, including the determination of an appropriate unit for collective bargaining." *Id.* at 39a-40a.

On remand, after a further hearing, the Board's Regional Director (RD) determined that "[Seaboard's] operations and functions are such as to warrant a finding that only an overall unit is appropriate." Pet. App. 78a. The RD advised petitioner that, under

established Board policy, an election would not be conducted among the employees in the overall unit unless petitioner "submit[ted] an adequate showing of interest." *Id.* at 79a-80a n.30.[1] Because petitioner was unable to meet that requirement, its representation petition was administratively dismissed.

2. Petitioner subsequently filed a lawsuit against the Board in the United States District Court for the Southern District of Florida. Pet. App. 5a. Petitioner sought a declaratory judgment that the Board "violated its own rules and regulations and statutory directives by reviewing and/or reversing a decision by the [ARD] in a representation case," and that the Board "violated [petitioner's] and Seaboard employees' constitutional due process rights by denying Seaboard's employees the right to select a bargaining representative." *Ibid.* As relief, petitioner requested that the district court reinstate the ARD's original unit determination and "recognize the ballots" cast in the February 15, 1998, election as "the true expression of the unit members' will." *Id.* at 6a.

The district court dismissed petitioner's suit for lack of subject-matter jurisdiction. Pet. App. 10a. The district court explained that "[i]t is settled law that NLRB decisions regarding representations are generally directly non-reviewable by district courts except in certain limited circumstances." *Id.* at 7a-8a. The two limited exceptions relied on by petitioner, the court noted, are situations "where the NLRB has violated a constitutional right of the complaining party," *ibid.*

---

[1] The Board generally will not conduct a representation election unless the petitioning union demonstrates that it has been designated as the bargaining representative of "at least 30 percent of the employees" in the appropriate unit. 29 C.F.R. 101.18(a).

(citing *Milk & Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F.2d 763 (D.C. Cir. 1962)), and where the Board "clearly acted 'in excess of its delegated powers and contrary to a specific prohibition in the Act,'" *ibid.* (quoting *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958)).

The district court concluded that neither exception applied here. Pet. App. 8a-10a. The court found that petitioner had failed to show that the Board violated any constitutional right of petitioner in the representation proceeding. *Id.* at 8a-9a. The court found that petitioner "failed to meet [the] *Leedom* v. *Kyne* exception" because Section 9(b) of the Act grants the Board discretion in defining appropriate bargaining units. *Id.* at 9a. The court further found that "the NLRB complied with its rules and regulations" when, in granting Seaboard's request for review, the Board determined that the ARD's initial decision "raises substantial issues warranting review" and was "contrary to established law." *Id.* at 10a.

3. Petitioner appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. Pet. App. 1a. The court of appeals summarily affirmed the district court's order of dismissal in an unpublished decision. *Id.* at 1a-2a.

ARGUMENT

The district court correctly concluded in this case that it lacked subject-matter jurisdiction over petitioner's lawsuit against the Board. The court of appeals' summary affirmance of that decision does not conflict with any decision of this Court or of any other court of appeals. Further review by this Court is therefore not warranted.

1. It is well settled that a party (such as petitioner) that disagrees with a decision of the Board in a representation proceeding generally cannot obtain direct review of that decision in the federal courts. See *Boire* v. *Greyhound Corp.*, 376 U.S. 473, 476-477 (1964). Rather, to obtain judicial review of a Board representation decision, the party seeking review must first commit a pertinent unfair labor practice. *Id.* at 477; *AFL* v. *NLRB*, 308 U.S. 401, 409 (1940). Upon entry of a final order by the Board in the unfair labor practice proceeding, the aggrieved party (whether an employer or a union) may then obtain judicial review of the underlying representation decision by filing a petition for review of the Board's final order in a court of appeals. See 29 U.S.C. 159(d), 160(f); *Magnesium Casting Co.* v. *NLRB*, 401 U.S. 137, 139 (1971) (unlawful refusal to bargain by employer to obtain judicial review of Board's definition of the appropriate bargaining unit); *Boire*, 376 U.S. at 477 (same); *Union de la Construccion de Concreto y Equipo Presado* v. *NLRB*, 10 F.3d 14, 16 (1st Cir. 1993) (Breyer, J.) (explaining that union may obtain judicial review of a Board representation decision by engaging in picketing that "amounts to an unfair labor practice"); *Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 71* v. *NLRB*, 553 F.2d 1368, 1371-1372 (D.C. Cir. 1977) (unlawful recognitional picketing by union to obtain judicial review of Board's dismissal of union's representation petition).[2]

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[2] In light of the decisions discussed in the text, petitioner errs in asserting (Pet. 4, 7-8) that, under the National Labor Relations Act, only employers, but not unions, are able to seek judicial review of unfavorable Board representation decisions.

This Court has recognized a narrow exception to the general rule that Board representation decisions are not subject to direct judicial review. See *Leedom* v. *Kyne*, 358 U.S. 184 (1958). In *Leedom*, the Court held that federal district courts have jurisdiction to review Board representation decisions "made in excess of [the Board's] delegated powers and contrary to a specific prohibition in the Act." *Id.* at 188. Some courts of appeals have also concluded that district courts possess jurisdiction to review Board representation decisions where the challenging party asserts a constitutional due process claim. See *Milk & Ice Cream Drivers Union, Local 98* v. *McCulloch*, 306 F.2d 763, 765 (D.C. Cir. 1962); *Fay* v. *Douds*, 172 F.2d 720, 723 (2d Cir. 1949) ("not transparently frivolous" constitutional claim).

In this case, petitioner did not seek judicial review of the Board's rulings in the representation proceeding—as would have been the ordinary statutory course—by committing an unfair labor practice (for example, by engaging in unlawful recognitional picketing at Seaboard's premises) and then filing a petition for review of a final Board cease-and-desist order in a court of appeals. See *Drivers, Chauffeurs, Warehousemen & Helpers, Local No. 71, supra.* Rather, relying on exceptions set forth by this Court in *Leedom* and by the Second Circuit in *Fay* to the general rule of non-direct judicial review of Board representation decisions, petitioner filed a lawsuit against the Board in federal district court. See Pet. App. 3a-6a, 8a. The district court, however, dismissed petitioner's lawsuit for lack of subject-matter jurisdiction because petitioner failed to establish that, in the representation proceeding, the Board had violated either petitioner's constitutional rights, a clear statutory mandate, or its own rules and

regulations. *Id.* at 9a-10a. The district court's fact-bound ruling, which was summarily affirmed by the court of appeals, raises no issue warranting this Court's review.

2. Petitioner primarily contends that this Court should grant the petition in order to establish that federal district courts possess jurisdiction "to render declaratory relief to an aggrieved party when the Board disregards its own rules, thereby violating a party's due process rights." Pet. 5; see Pet. i (Question 1), 13-16. The district court, however, did not hold that it would lack jurisdiction in such a case. To the contrary, following *Fay* and its progeny, the district court stated that it would have jurisdiction to review a Board representation decision if "the NLRB has violated a constitutional right of the complaining party." Pet. App. 8a. The court also ruled, however, that that principle did not vest it with jurisdiction in this case because the Board had not violated petitioner's constitutional rights and had "complied with its rules and regulations." *Id.* at 9a-10a.

Petitioner further contends (Pet. 17-18) that this Court should grant review to establish that, under *Leedom*, federal district courts have jurisdiction to review Board representation decisions if the Board has violated its own procedural rules, as distinguished from a mandatory provision of the Act. Again, however, the district court did not disagree with petitioner on that point. The district court considered whether jurisdiction might be proper on this basis under *Leedom*, but resolved that question in the negative because the Board had "complied with its rules and regulations" in the representation proceeding. Pet. App. 9a-10a.

Petitioner repeatedly suggests (*e.g.*, Pet. 3, 6, 16) that the district court should have asserted jurisdiction in

this case because the Board in fact violated its procedural rules when it granted Seaboard's request for review of the ARD's initial bargaining unit determination. The courts, however, "must give substantial deference to an agency's interpretation of its own regulations." *Thomas Jefferson Univ.* v. *Shalala*, 512 U.S. 504, 512 (1994). Here, petitioner fails to make any substantial showing that the Board's granting of Seaboard's request for review was "plainly erroneous or inconsistent with the [relevant] regulation," *ibid.* (internal quotation marks omitted), much less that this procedural issue is sufficiently important to warrant this Court's review.

Petitioner further argues (Pet. 3, 16) that the Board's rules prohibited the Board from granting Seaboard's request for review of the ARD's ruling and from disturbing that ruling. Petitioner is mistaken. The Board's rules specifically provide that the Board may grant a request for review of a Regional Director's decision in a representation proceeding where "a substantial question of law or policy is raised because of * * * a departure from, officially reported Board precedent." 29 C.F.R. 102.67(c)(1)(ii). That was precisely the basis upon which the Board granted Seaboard's request for review. See Pet. App. 35a. In setting aside the ARD's unit determination, the Board found that the truncated bargaining unit defined by the ARD (and proposed by petitioner) was contrary to officially reported Board precedent prohibiting "fractured units, *i.e.*, combinations of employees that are too narrow in scope or that have no rational basis." *Id.* at 37a. Accordingly, as the district court held in dismissing petitioner's suit (*id.* at 10a), the Board's action in this case was fully consistent with the relevant procedural rules. See *NLRB* v. *Sav-On-Drugs, Inc.*,

709 F.2d 536, 541 (9th Cir. 1983) (Board properly reviews Regional Director's decision under 29 C.F.R. 102.67(c)(1)(ii) where Regional Director "applied the wrong standard and departed from Board precedent.").[3]

3. Finally, petitioner contends (Pet. 18-19) that unions (but not employers) generally should be free to seek direct review of Board representation decisions in federal district courts because suits by unions do not implicate concerns about the use of litigation for "dilatory tactics." That argument is unpersuasive. As a case cited by petitioner explains (Pet. 19), unions as well as employers may pursue litigation in district court for purposes of delay. See *Florida Bd. of Bus. Regulation* v. *NLRB*, 686 F.2d 1362, 1369 (11th Cir. 1982) (general rule of non-direct judicial review is designed "to prevent attempts by an employer or a rival union to use the district court merely as a weapon

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[3] Although, as we have explained, the district court correctly dismissed petitioner's lawsuit for lack of jurisdiction, we do not agree with the district court's suggestion that a plaintiff's allegation that the Board violated its rules and regulations in a representation proceeding would be a sufficient basis for the assertion of jurisdiction by a district court. The better view is that an allegation that the Board has violated one of its own rules, but not a statutory mandate, is not sufficient to vest the district court with jurisdiction under the *Leedom* exception. See *United Food & Commercial Workers, Local 400* v. *NLRB*, 694 F.2d 276, 278-279 (D.C. Cir. 1982) (per curiam); *Catalytic Indus. Maint. Co.* v. *Compton*, 333 F. Supp. 533, 536-537 (D.P.R. 1971). In addition, it is questionable whether *Fay* was correctly decided. See *Blue Cross & Blue Shield* v. *NLRB*, 609 F.2d 240, 244-245 (6th Cir. 1979); *J.P. Stevens Employees Educ. Comm.* v. *NLRB*, 582 F.2d 326, 329 (4th Cir. 1978). This case, however, does not present the Court with an occasion to resolve either of those issues, for, as the district court observed, petitioner's allegations of violations of Board rules and procedural due process are without substance.

to delay a Board-ordered election"). Contrary to petitioner's suggestion (Pet. 19-20), moreover, nothing in *Florida Board* supports its argument that district courts may generally review Board representation decisions when the party seeking review is a union rather than an employer. See 686 F.2d at 1370 (noting that lawsuit in that case "does not seek review of a [Board] representation order * * * or the certification of election results").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD & SEABOARD MARINE LIMITED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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ARGUMENT

I. The National Labor Relations Board Does Not Dispute The Conflict Among Circuits Or The Existence Of An Unresolved Question Of Federal Law.

ILA has identified in its Petition the threshold basis for granting the writ of certiorari and for this Court invoking its discretionary jurisdiction. As explained in the Petition, this Court faces an unresolved question of federal law and a conflict among various Circuit Courts relating to a union's right to obtain judicial review of an otherwise unreviewable decision issued by the National Labor Relations Board (the "Board"). As set forth in *Fay v. Douds*, 172 F.2d 720 (2d Cir. 1949), if the Board violates a union's constitutional or due process rights, this vests a district court with jurisdiction to render relief. Various circuits have either adopted or rejected *Fay*, but nearly every court addressing the issue observes that this Court has never resolved the conflict or answered this critical question (*See* Petition at 10-12 n.2). The Board does not contest this issue.

II. A Labor Union Does Not Have A Meaningful Right Of Access To Judicial Review.

Rather than challenge the propriety of this Court's jurisdiction, the Board focuses upon the merits of ILA's claim and attempts to justify the district court's dismissal of ILA's declaratory action. The Board contends that a labor union possesses the same right of access to judicial review as does an employer. The Board's argument is misplaced, however, because it overestimates a union's ability to obtain review of a Board representation decision.

As a threshold matter, it is axiomatic that although an employer has an indirect right of appeal, neither an employer nor a labor union are entitled to appellate or judicial review of a representation decision rendered by the Board under 28 U.S.C. § 159. Historically, however, employers obtain judicial

review of a representation proceeding by forcing a victorious labor union to initiate an unfair labor practice charge. If a group of employees are designated by the Board as a unit and that unit votes for representation by a specific union, the employer merely refuses to acknowledge the union as the authorized bargaining unit. The union has no alternative but to initiate the unfair labor practice charge or risk losing members. Once the Board inevitably determines that the employer committed an unfair labor practice by refusing to bargain with the recognized union, the unfair labor practice charge and the underlying representation decision are reviewable to an appellate court. 29 U.S.C. § 160. This means that anytime an employer is dissatisfied with a Board representation ruling, it obtains appellate review by refusing to bargain with the union. The crux of ILA's predicament, however, as with any union or employee, is that the union, unlike an employer, cannot initiate the unfair labor practice charge that triggers the review mechanism. This means that even if the Board violates a union and employees' due process and First Amendment rights by disregarding its own rules and thereby subjugating the reciprocal right of association and union representation, the aggrieved parties have no avenue for relief. As the Second Circuit observed in *Goethe House, German Cultural Center v. NLRB*, 869 F.2d 75, 80 (2d Cir. 1989):

> As an employer, Goethe House has the option of seeking indirect review of the Board's order by refusing to bargain with the union, if it is certified, and then seeking review of its position in a court of appeals. In [*Leedom*] *v. Kyne*, by contrast, the plaintiff in the district court was a labor organization. As a labor organization, it did not have the option, available to an employer, to seek indirect judicial review of the Board's action.

A losing union, unlike an employer, does not have the ability to "refuse to bargain" with the employer so as to initiate the unfair labor practice charge.

The Board argues that a losing union can initiate the unfair labor practice charge through recognitional picketing which is a violation of 29 U.S.C. § 158 (Response at 6). The Board's suggestion that the union violate federal law by inciting unlawful recognitional picketing is completely contrary to Congress's goal of facilitating smoother employer-employee relations and avoiding negative impact upon interstate commerce. Also, recognitional picketing may have no effect at all. The employer may simply ignore the picketing employees, thereby perpetuating the union's inability to obtain any relief. Alternatively, the employer may pursue injunctive relief and stop the recognitional picketing altogether. *Kobell v. United Food and Commercial Workers Int'l Union*, Local 23, AFL-CIO-CLC, 788 F.2d 189, 194 (3d Cir. 1986) (noting that an employer has the right to obtain injunctive relief against a union engaging in improper picketing). Moreover, those employees who are willing to engage in recognitional picketing may be terminated for cause, thereby losing both their representation rights and their income. In *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 109 (3d Cir. 1979), the Third Circuit specifically denounced the Board's argument. As the court explained:

> Unlike the employer, who has it within his own power to preserve the status quo by refusing to bargain, and to obtain judicial review if the Board proceeds against it under § 10 [an unfair labor practice proceeding], the losing union is left without a collective bargaining relationship, and with no certainty that its resort to [recognitional] picketing will produce an unfair labor practice charge. If the picketed employer finds the picketing ineffective, he may refrain from filing a charge. The general counsel may decline to act even if a charge is filed. Moreover, to insist that a losing union begin recognitional picketing in violation of § 8(b)(7)(b)

> would seem to contravene Congress' purpose in enacting the statute limiting such picketing and avoiding its disruptive impact. Worst of all, an employee adherent of the losing union, by picketing in violation of § 8(b)(7)(b) and thus committing an unfair labor practice, incurs a risk of discharge for cause.

The Board's contention that a union or employees should engage in an illegal act as a pretext to obtaining judicial review of a Board violation proves ILA's argument and highlights the magnitude of the issue before the Court. Since there is no statutory right to appellate review when the Board violates its own rules and due process rights, if a union or employees it seeks to represent cannot sue in a district court for the violation, they have no remedy.

III. The Board Violated Its Own Rules And Regulations And ILA's Constitutional Rights By Disregarding And Reversing A Final Decision Rendered By Its Regional Director.

The Board argues that it did not violate its own rules and regulations. As clearly set forth in ILA's petition, however, the Board disregarded 29 C.F.R. § 102.67, which limits the Board's right to accept review of a Decision and Direction of Election issued by a regional director. Board rules specify that a regional director's representation decision will be deemed final unless reviewed for one of four, specific bases. As outlined in the Petition, the Board disregarded the self-imposed limitation, violated its own rules, deprived employees of their choice of representative, and violated ILA's due process and First Amendment rights. This Court should conclude that the *Fay* doctrine vests a district court with subject matter jurisdiction to render declaratory relief to an aggrieved union under such circumstances.

CONCLUSION

For the reasons set forth in the Petition and herein, this Court should grant a Writ of Certiorari and address the merits of this controversy.

Respectfully submitted,

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